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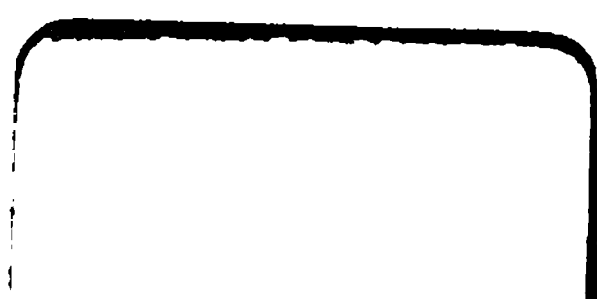
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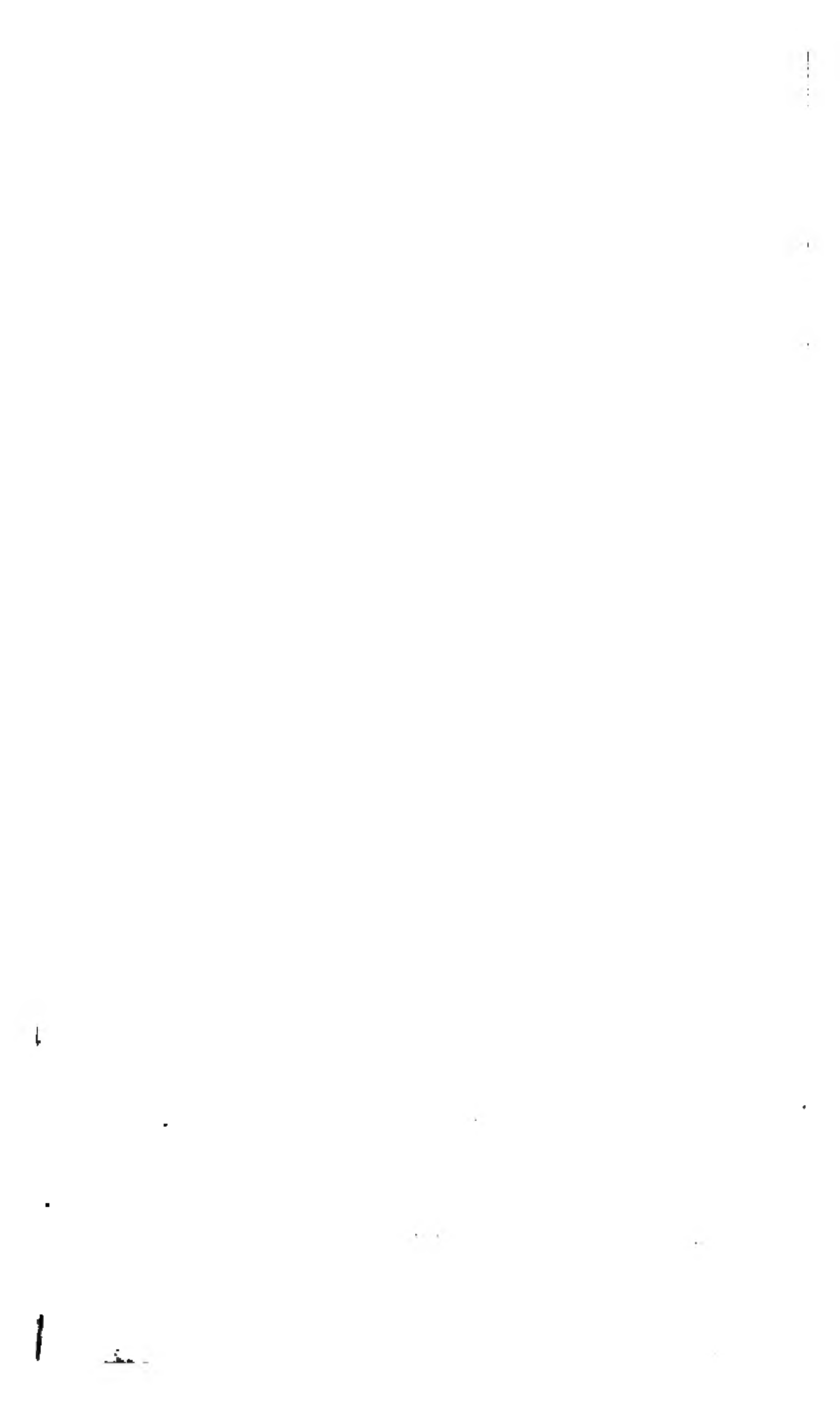
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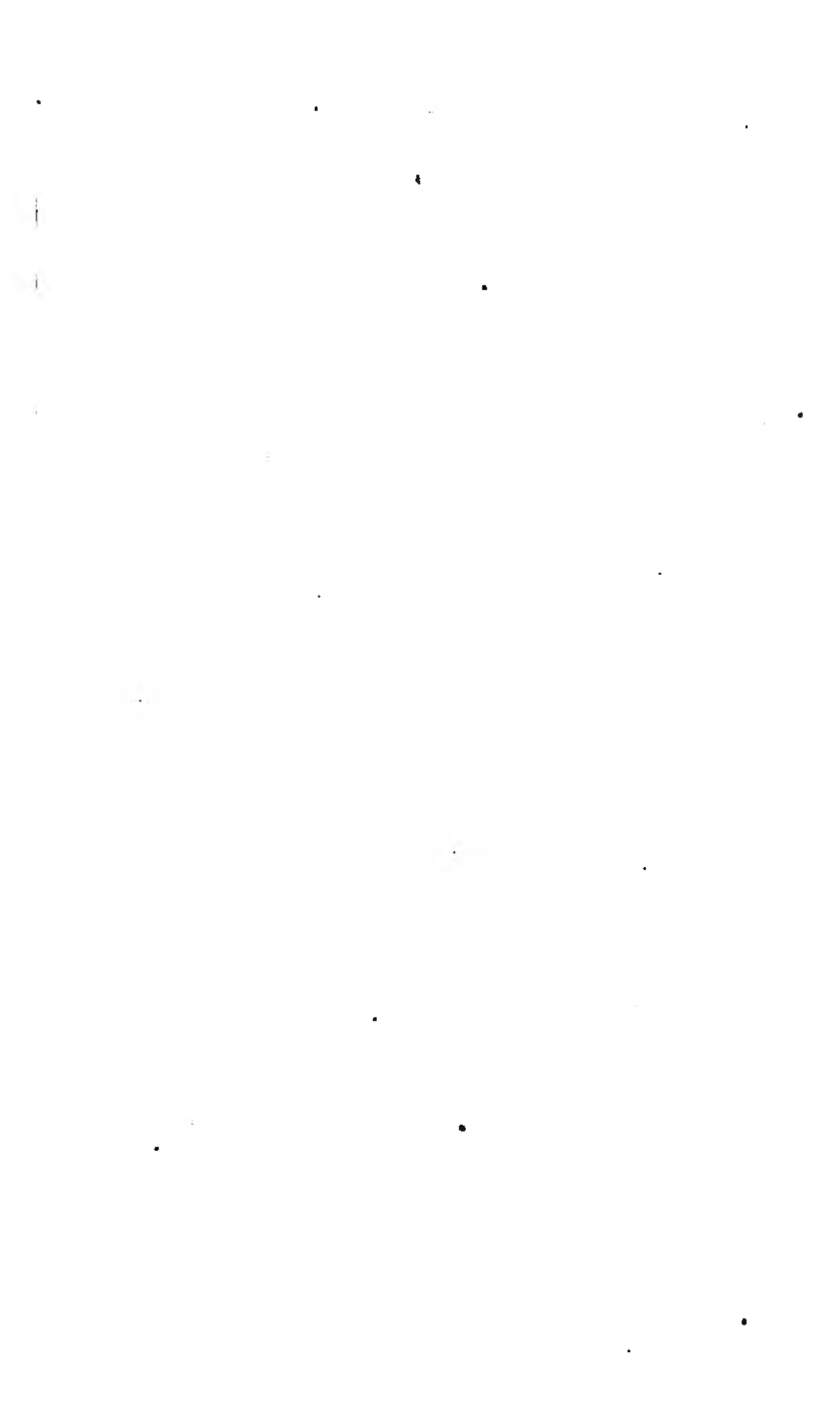
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THE
LAW OF INJUNCTIONS.

BY
FRANCIS HILLIARD,
AUTHOR OF "THE LAW OF TORTS," "NEW TRIALS," ETC.

"Castigatque auditque dolos." — VIRG.

SECOND EDITION, REVISED AND GREATLY ENLARGED.

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PREFACE.

THE present work is strictly confined to the subject expressed in the title ; namely, *Injunctions*. It is a very noticeable fault in a law treatise, as well as any other, if, while not wanting in *avowed unity of plan*, it fail in *unity of execution* ; if, tempted by some casual association of other subjects with that of which it professes to treat, it fly off from the latter, and fill up its pages with the statement of cases and principles, which, however valuable in themselves, have no *scientific* connection with the main topic sought to be illustrated. Acknowledging its manifold other faults, I think this book will not be found chargeable with the one in question. I take occasion to add, however, that, in treating of this single branch of the great *code* of *equity jurisprudence*, I have often been strongly tempted to wander into its other copious departments — with all of which injunction has a direct connection. Equity is a portion of the law, with which no one can be brought even incidentally in contact, without becoming deeply interested, and inspired with the desire of a thorough and exhaustive exploration of what Judge Story denominates the “interior compartments and secret recesses,” of a “magnificent temple.” A

few remarks upon the general subject may be pardoned in *the preface*, as no departure from the rule above laid down with regard to the work itself.

Perhaps there is no feature in our American jurisprudence more full of encouragement, than the now prevalent disposition — supplanting a morbid and undefined fear of the shapeless evils which might result from such a policy — to incorporate into our law the benign principles and the comprehensive and searching remedies of equity.¹ In one aspect, more especially, is this a most desirable tendency. I refer to the adoption of equity jurisprudence, as a substitute for attempts to soften, modify, and adapt the common law, by express statutory enactments. Had the rules and remedies of equity been introduced, with the common law, into our colonial and provincial jurisprudence; it may be doubted whether the statute books of the several United States would have so abounded with brief, positive, and abrupt changes upon some of the most vital subjects of municipal regulation. These changes have been, with some truth, no doubt, deemed essential, in order that the law, the growth of less enlightened periods, might keep up with the progress of society. But, from the nature of the case, the remedy has often proved far worse than the disease. Unforeseen consequences have resulted, from the sudden abrogation of time-settled rules and principles, far more disastrous than any occasional hardship or abuse in their practical application. As a single example, I need only mention the

¹ See the remarks of Mr. Chief Justice Gibson, on page 510.

relation of *husband and wife*—in reference to which American legislation has been so sweeping, so fluctuating, so incoherently various, and, is it too much to say, in some respects so unqualifiedly discreditable. With regard to this and numerous other subjects which fall under equity jurisdiction, it would have been far better, that the rigor of the common law should have been softened and *toned*, with exceptions and qualifications, like itself the gradual product of advancing ages; than that the same end should have been sought by a few lines of statutory provision, in a breath undoing the work of years and centuries, and often themselves furnishing the material for doubtful construction and interminable litigation.

The present work is designed to be *thoroughly American*. While the English cases have been cited, sufficiently to give a correct view of the English law, as the original foundation, and an existing constituent part, of our own jurisprudence; the process of *selection* has been more largely applied to them than to the decisions of the American courts, which last are designed to be fully and exhaustively stated. The subject of injunction involves so many points which are strictly points of *practice*, and the English differs so widely from the American practice, that many of the English cases would be of little practical value in the United States. It is believed, however, that the leading English decisions, more especially those of the most recent date, will be found referred to, and often stated at considerable length. At the present moment, when the indications are so strong, of a pre-

vailing desire to have the events of the last four years treated as if they had never been, it is perhaps hardly necessary to remark, that, in citing the American cases, no distinction is made between the Northern and Southern States. It so happens, that the decisions of Southern courts upon the subject of injunction are comparatively very numerous. Every lawyer knows, that the judgments of those tribunals often bear a favorable comparison with those of any others in the land. Upon the one great subject, which now seems to have providentially disappeared from the broad surface of American social and civil life, the remarks of a distinguished jurist are no exaggeration, even as applied to Southern judges; to whom, indeed, it would seem they are almost exclusively applicable, not from want of disposition, but of opportunity, in any others, to illustrate them. "As slavery is in derogation of natural right, and exists only by positive institution, the courts of this country, actuated by the spirit of the common law, have always been disposed to apply the maxim, *jura in omni casu libertati dant favorem*." "For the trial of the question of freedom—in all the cases in the books it seems that a wide indulgence is granted to the claimant, and the court will not suffer him to be defeated by an omission of formalities of procedure."¹

If Southern courts and judges have thus humanely and manfully withstood those legislative and popular influences, which are very far from being entitled to the commendation just quoted; their integrity as

¹ 1 Parsons on Contracts (3d ed.), pp. 326, 328.

well as ability may well entitle their adjudications upon any subject to be received everywhere with undiminished respect.

Injunction has been a subject of much *statutory* regulation. While, as I have already remarked, the prevailing tendency now is, to adopt equity into American jurisprudence; the distinction is very generally abrogated between *courts* of law and equity, and in some instances between *proceedings* in law and equity. The aphorism of Lord Bacon, to the practical wisdom of which, notwithstanding the *theoretical* absurdity of two codes of law, each administered by its own tribunal, in the same government,¹ many will even now be disposed to assent, is pretty extensively set at nought in American legislation. “Apud nonnullos receptum est, ut jurisdictio, quæ discernit secundum æquum et bonum, atque illa altera, quæ procedit secundum jus strictum, iisdem curiis deputentur: apud alios autem, ut diversis; omnino placet curiarum separatio. Neque enim servabitur distinctio casuum, si fiat commixio jurisdictionum, sed arbitrium legem tandem trahet.”²

The result has been, with reference to the subject of injunction, that in many of the States injunctions may be granted by the courts, or the judges thereof, miscellaneously. The same power is sometimes,

¹ Hardly exceeding, however, the abstract anomaly, but, as experience has proved, actual and triumphant success, of *two sovereignties* over one and the same people. (See the very recent case of *Thompson v. Railroad Companies*, 6 Wallace, to the point, that law and equity must for some purposes retain their original distinction, notwithstanding the attempt of State legislation to blend them into one system.)

² Bacon, de Aug. Scient. lib. 8, chap. 3, aph. 45.

though not often, conferred upon mere ministerial officers of the courts. From this consolidation of law and equity, other changes, also, have necessarily ensued, with reference to a proceeding which in its origin was so strictly *equitable*. In the *Appendix* will be found a summary statement of the statutory provisions in the several States; as also of some of the latest cases, which were not inserted in the body of the work.

With regard to the plan and arrangement of the present work, it will be seen that the first six chapters, as compared with those which follow, are of a general and comprehensive character. The succeeding chapters, relating to the *grounds, parties, and subjects* of injunction, are necessarily more brief and fragmentary, the same points and cases having been previously stated in some other connection. And this threefold division itself is unavoidably somewhat inaccurate; the respective questions, for what injury, by or against what person, and in reference to what subject-matter, an injunction may issue, from the very nature of the case often running into each other. The division adopted, whether good or bad, is my own. It may follow, but has not been borrowed from that of any other work.

To the present edition very large additions have been made, of English and American cases, casually omitted from the original work, or decided since its first publication.

F. H.

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THE LAW OF INJUNCTIONS.

CHAPTER I.

DEFINITION, NATURE, AND PURPOSES OF AN INJUNCTION.

1. Definition ; injunction in criminal cases ; whether *auxiliary*.
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§ 1. An injunction is defined as “a prohibitory writ, specially prayed for by a bill in which the plaintiff’s title is set forth, restraining a person from committing or doing an act (other than criminal acts) (*a*) which appears to be against

(*a*) An early, and somewhat striking and *dramatic* case, would seem to negative this exception. The defendant and Sir William Russell, dining with the plaintiff at his house, after dinner, fell into play with the plaintiff and won of him in ready money about 900*l.*, which Brett brought away with him (though when they began to play, the defendant and Sir William Russell had not above eight guineas between them), and Sir Basil, being somewhat inflamed with wine, brought down a bag of guineas containing about 1500*l.*, and Brett won that money also, and had it in his possession; but as he was going away with it out of the house, Firebrasse and his servants seized upon it and took it from him. Firebrasse had brought an information against Brett for playing with false dice, but Brett was acquitted; and Brett had brought an action of trespass against Firebrasse for taking from him, in a forcible manner, this bag of guineas; and thereupon Firebrasse exhibited his bill, charging many circumstances of fraud and circumvention, which were denied by the defendant’s answer; and upon the plaintiff’s motion the Lord Chancellor granted an injunction till the hearing of the cause, and said that he thought the sum very exorbitant for a man to lose at play in one night, and that if it was in his power he would prevent it, and cited the case of Sir Cecil Bishop and Sir John Staples, in the Lord Chief Justice Hale’s time, about a wager upon a foot-race, and that the Chief Justice in that case said that those great wagers *preceeded from avarice, and were founded in corruption*. *Firebrasse v. Brett*, 1 Vern. 489.

In a very late case in Pennsylvania (*Sparhawk v. Union, &c.*, 54 Penn. 401), an injunction against the running of Sunday horse-cars was refused, partly upon the ground of liability to a criminal prosecution. The case is somewhat remarkable for the amount of theological learning, illustrated by copious Scriptural quotations and otherwise, which appears in the opinions of the several judges. Christianity, as part of the common law, and the *adaptation*, and in some respects *limitation*, of the Sabbath to the Jews, are points very elaborately discussed, with some differences of opinion among the individual members of the court. The case will well repay a careful perusal.

Some other cases will incidentally show the prevailing opinion of the courts upon this subject.

In the case of the Attorney-General *v. Cleaver* (18 Ves. 219), Lord Eldon remarked: “This court has originally no jurisdiction whatsoever either to enjoin or regulate the proceedings upon an indictment, but circumstances may give that jurisdiction: where, for instance, the relators are the persons prosecuting the indictment, I should have a control by order personally affecting

equity and conscience.”¹ If the subject of a bill in equity be “to quiet the possession of lands, to stay waste, or to

¹ Bouv. Law Dict.; Whart. Law Dict.

them; but I am not satisfied that I have the same control over these defendants, who have not come in. There is one case of a bill, and a cross-bill, and also an indictment between the plaintiffs and defendants. Lord Hardwicke held that he would deal with the subject with reference to what was civilly in question between them, though also the subject of a criminal prosecution; but I do not find that he thought himself justified in that with regard to persons who had not themselves resorted to him.”

The plaintiffs claim the sole right of fishing in the river Ouse; the defendant claims a right likewise; a bill and cross-bill were brought, to establish their several rights. While these suits were depending, the plaintiffs caused the agent of the defendant to be indicted at York sessions, where they themselves are judges, for a breach of the peace, in fishing in their liberty. A motion was made on behalf of the defendant, to stop the prosecution. Lord Chancellor (Hardwicke): “This court has not originally and strictly any restraining power over criminal prosecutions; and, in this case, if the defendant had applied to the attorney-general, he would have granted a *noli prosequi*. For when a complaint is grounded on a civil right, for which an action of trespass would lie, the attorney-general of course grants a *noli prosequi*. This is a complaint merely for fishing in the river, without any actual breach of the peace, which the mayor and corporation say is a trespass upon them. If it could be made appear at law, that the plaintiffs were both judges and parties, it might come out to be *coram non judice*, but it might be difficult to make out this. If actions of trespass had been brought *vi et armis*, this court would have stopped them; but though I cannot grant an injunction, yet I may certainly make an order upon the prosecutors to prevent the proceeding on the indictment. Where parties submit their right to the court, they have certainly a jurisdiction, and may interpose. Therefore I will make an order to restrain the plaintiffs from proceeding at the sessions, till the hearing of the cause and further order.” *The Mayor, &c. v. Sir Lionel, &c.*, 2 Atk. 302.

A bill charged that the plaintiff, as lord of a borough, was entitled to a heriot on the death of any tenant, and that conveyances were made to the defendants in trust, to defraud him; and prayed a discovery of the deeds, and an injunction or equivalent order to stay proceedings on a mandamus to compel the plaintiff to hold a court, and admit the defendants as tenants. A demurrer to the bill was allowed. Hardwicke, Lord Chancellor, said: “If I should overrule this demurrer, I should open a new door of jurisdiction to this court, which, I believe, would afford a scene of very great inconvenience and mischief, and bring all the corporation and borough causes in this kingdom in some shape or other on the footing of discovery or relief. This court has no jurisdiction to grant an injunction to stay proceedings on a *mandamus*; nor to an *indictment*; nor to any information; nor to a writ of prohibition, that I know of. The reason is, that a *mandamus* is not a writ remedial, but mandatory. It is vested in the king’s superior court of common law to compel inferior courts to do something relative to the public. That court has a great latitude and discretion in cases of that kind, can judge of all the circumstances, and is not bound by such strict rules as in cases of private rights. I will go by Littleton’s rule, that

stop proceedings at law, an injunction is also prayed, in the nature of an interdiction by the civil law, commanding the defendant to cease.”¹

§ 2. It is said, “an injunction is extraneous to the cause and not a proceeding in it.”² (See § 18.) So it is held, that the injunction can issue only as *auxiliary* to some primary equity, except to stay waste or prevent irreparable injury.³ (a)

¹ 3 Bl. Comm. 441.

² Per Sir L. Shadwell, V. C.; *Gooseman v. Dann*, 10 Sim. 518; *Widner v. Lane*, 14 Mich. 124.

309; *Schofield v. Bokkelen*, Ib. 342; *McRae v. Atlantic, &c.*, Ib. 395; *Eborn v. Waldo*, 6 Jones Eq. 111; *Martin v. Cook*, Ib. 199.

³ *Stockton v. Briggs*, 5 Jones Eq.

it is a good argument, an action lies not, because one was never brought. I never knew a bill of this kind, and therefore will not make the precedent.” *Lord Montague v. Dudman*, 1 Ves. 396-7-8.

Upon the general subject of this note it may be remarked, that the rule, often found stated in the books, of excluding *criminal cases* from the operation of an injunction in equity, is left somewhat uncertain, both in its origin and applications. It seems to be indiscriminately understood, as precluding this interference with *criminal prosecutions*, and also with cases which may become the *subjects* of criminal prosecution. The former application would be founded rather upon the principle of non-interference with another independent jurisdiction; the latter upon the familiar ground, that equity does not interpose where there is an adequate remedy at law. The case of *public nuisance*, where the attorney-general, the same public officer who takes charge of an indictment, is also the proper plaintiff in a bill for injunction, must certainly be regarded as an instance of concurrent criminal and equitable jurisdiction. (See chap. 9, § 3.)

(a) The Supreme Court of Maine can issue writs of injunction only in cases within its equity jurisdiction. *Smith v. Ellis*, 29 Maine, 422.

The 21st article of the charge against Cardinal Wolsey is, “that the said Lord Cardinal hath granted many injunctions by writ, and the parties never called thereunto, nor bill put in against them.” (See 1 Vern. 156, n., 4 Inst. 92.)

The connection, or distinction, between the *specific* relief afforded by an injunction, and the *general* relief uniformly claimed by a bill in equity, was explained by Lord Hardwicke in an early case in equity. This was a bill for an account and general relief. The defendant having answered, and brought a suit at law, the plaintiff amended his bill, by order, without costs, on requiring no further answer, and in the amended bill prayed an injunction of the suit. On motion for an injunction, Lord Hardwicke was of opinion, that the defendant might answer further *gratis*; and said it had never been determined that prayer of general relief would take in an injunction: that Lord Macclesfield was of opinion a proper writ of injunction could not be granted, but on express prayer in the bill; for as against the general words the defendant might make a different case than he would against a prayer for an injunction. *Savory v. Dyer*, 1 Ambl. 70. Acc. *Wright v. Atkins*, 1 Ves. & B. 314, per Ld. Eldon.

Though a bill for injunction will not be dismissed, because the plaintiff cannot have the further relief asked.¹

§ 2 a. Injunction, like other remedies and processes adopted in courts of equity, may be at least partially traced to the Roman or civil law. It is said to resemble the Roman *Interdict*.² And it is elsewhere remarked, "the interdicts of the Roman law, which much resembled the injunctions of our own law, were 1. Prohibitory, which prohibited something being done. 2. Restoratory, which commanded something to be restored. 3. Exhibitory, which commanded some person or thing to be exhibited."³

§ 3. The following distinction is taken between an injunction and the somewhat analogous remedy of *prohibition*: (a)

§ 4. "A *prohibition* is a remedy against an encroachment of jurisdiction, issues only from a superior court, is granted on the suggestion that the court to which it is directed has not the legal cognizance of the cause, and is directed to the judge of the inferior court as well as to the parties in the cause. An injunction, on the other hand, where its object is to restrain proceedings in another court, is directed only to the parties, neither assumes any superiority over the court in which they are proceeding, nor denies its jurisdiction, but is granted on the sole ground that from certain equitable circumstances of which the court that issues it has cognizance, it is against conscience or the party to proceed in the cause."⁴ (b)

¹ Woodward v. Clark, 15 Mich. 104.

² 3 Dan. Cha., &c., 1715 n.

³ Hal. Rom. L. 102.

⁴ Waterman's Eden, Introd. 14.

(a) The remedies of injunction and *certiorari* are sometimes compared. Thus, if a justice of the peace grants a new trial without notice, and the party does not appear at the second trial, he may elect between an injunction and a *certiorari*. Aycock v. Williams, 18 Tex. 392.

(b) The same principle, of the absence of other remedy, has been applied to *prohibition*, which prevails with reference to injunction. In the leading case of Jefferson v. Durham, 1 Bos. & P. 131, Mr. Justice Heath remarks, "There is less reason for granting this prohibition, because it is not the only remedy; the crown has its officers, whose duty it is to watch over its interest. The metropolitan may proceed against the bishop for dilapidation."

And it was accordingly decided in this case, after the most learned and elaborate discussion, both by counsel and court, that the Court of Common Pleas had

§ 5. In conformity with the general analogy, between injunction on the one hand, and an interdict or prohibition on the other; injunction is sometimes termed wholly “a *pre-ventive* remedy. (See § 14.) If the injury be already done, the writ can have no operation, for it cannot be applied correctively so as to remove it. It is not used for the purpose of punishment or to compel persons to do right, but simply to prevent them from doing wrong.”¹ It is also said: “The leading principle — the principle which I humbly conceive ought, generally speaking, to be the guide of the court, and to limit its discretion in granting injunctions, at least where no very special circumstances occur — is, that such a restraint should be imposed as may suffice to stop the mischief complained of, and where it is to stay injury, to keep things as they are for the present.”² So it is held, that an injunction granted on an *ex parte* application, on filing the bill, does not require the defendant to do or undo anything, but simply restrains him from acting;³ that its office is to restrain the acts of the defendant in the suit, and not to compel him to undo what he has already done, or to restore anything, further than this

¹ Atty.-Gen. v. N. J., &c., 2 Green, 136; Bradbury v. the Manchester, &c., 8 Eng. L. & Eq. 143; Cobb v. Smith, 16 Wis. 661.

² Per Lord Brougham, Blakemore v. Glamorganshire, &c., 1 My. & K. 185.
³ Bosley v. Susquehanna, &c., 3 Bland. 63.

no power to issue an original writ of prohibition to restrain a *bishop* from committing waste in the possessions of his see; certainly not, at the suit of an uninterested person. Whether any court of common law, or the Court of Chancery had such power, was discussed and doubted. Counsel remarked, “This is an application for a prerogative writ, without any other foundation than the angry *dicta* of Lord Coke, sitting in the King’s Bench, and asserting the jurisdiction of that court by throwing out an invitation to all the king’s subjects to move for such a writ, and yet it is remarkable, that, in the course of two hundred years, no person appears to have accepted the invitation. For his own opinion he had no other ground than a case in parliament which occurred three hundred years before.” Mr. Justice Heath remarks, in the same strain, “After all, what reliance can there be had on these *dicta* of Lord Coke under all the circumstances? They were not the result of a calm, dispassionate inquiry. That great lawyer was much heated in the controversy between the courts at Westminster and the ecclesiastical courts. In every part of his conduct his passions influenced his judgment. *Vir acer at vehemens*. His law was continually warped by the different situations in which he found himself.”

Mr. Chief Justice Eyre, however, rather comes to the rescue of Lord Coke: “I do not complain or think that there was anything of haste or passion in the inference, which his sagacity drew from the single record of 35 Ed. I,” although the inference was an erroneous one.

results from such restraint, unless issued after the decree, when it becomes a judicial process:¹ and these principles were applied in the following cases.

§ 6. The lessee of an inn covenanted to use and keep it open as such, and not do any act to forfeit the licenses. He having threatened to act in violation of the former part of the covenant, the lessor obtained an *ex parte* injunction, restraining him from the discontinuance covenanted against, and from doing any act whereby the licenses might become forfeited or be refused. No intention appearing to violate the negative part of the covenant, and the court having no power to enforce the other part, which would be equivalent to ordering the defendant to keep an inn; held, the injunction should be dissolved.² So, upon motion for an injunction, the object was, to compel the party to put everything in the same state in which it was before, by filling up a ditch he had made, as well as to prevent digging farther. Lord Thurlow said: "I will not order him to fill up this ditch before answer. That would be a great deal too much to do. This ditch may be a mile long. Take an order that he shall do nothing more till answer or farther order."³

§ 6 a. The distinction, however, between *prevention*, "or *prohibition*," and *command*, in reference to injunction, is sometimes rather nominal than substantial. Thus the tenant of a mine was restrained from permitting a communication with an adjoining mine to continue open, it being the purpose of the order to compel the defendants to close the communication.⁴ And a *mandatory* injunction may be granted, where the injury has been completed before the filing of the bill, whether in case of easements or other rights. Though it will be done only to prevent extreme or very serious damage. Thus it was refused, where the right of way in question was not wholly stopped, but the question was merely of the comparative convenience of the former and existing ways. So for a mere temporary and occasional inconvenience by allow-

¹ Murdock's case, 2 Bland, 461; Washington, &c. v. Green, 1 Maryland Ch. Decis. 97.

² Hooper v. Brodrick, 11 Sim. 47.

³ 1 Ves. Jr. 140.

⁴ Mexborough v. Bower, 7 Beav. (29 Eng. Cha.) 127.

ing carriages to stand in the roadway. So in case of a slight diminution of light and air to the plaintiff's houses.¹

§ 6 b. And it is further to be remarked, that the general theory of an injunction, as in its nature preventive, does not preclude the necessity of relying upon *facts*, in distinction from mere apprehensions, as furnishing ground for this interposition. It is remarked in a very late case, "Although I am not prepared to say that, if this case rested upon prospective nuisance only, enough is proved to warrant the interference of this court, I am by no means disposed to think that, where some degree of nuisance is proved to exist, and to have been increasing, the court in determining whether it should interfere ought not to have regard to the prospect of its further continuance and increase. The interference of the court in cases of prospective injury very much depends, as I apprehend, upon the nature and extent of the apprehended mischief, and upon the certainty or uncertainty of its arising or continuing, and the fact of the nuisance having commenced raises a presumption of its continuance."²

§ 6 c. Where only prevention is sought by the bill, the injunction will not be continued or made perpetual, after removal of the cause complained of, and of any danger to the plaintiff's rights.³

§ 7. From the nature of injunction as a preventive remedy it necessarily results, that, in order to justify its application, the injury in question must be likely to occur without it. Hence, where it appeared that there was no intention on the part of the defendants to do the alleged wrong, but they were attending to the plaintiff's objections, and endeavoring to ascertain what course was the best for them to pursue; the bill was dismissed, with costs. The court remark: "If an injunction were granted in this case, it would be an injunction to restrain the defendants from doing acts which they never had any intention of doing except in the performance of their

¹ Durell v. Pritchard, Law Rep. (Eng.) Eq. March, 1866, p. 243.

² Per Sir G. J. Turner, L. J. Gold-

smid v. the Tunbridge, &c., Law Rep. (Eng.) Eq. June, 1866, p. 353.

³ Wiswell v. First, &c., 14 Ohio St. 31.

duty, and which they have in pursuance of the plaintiff's suggestions formally resolved not to do at all."¹ And in a case relating to a watercourse, it was remarked, with reference to the necessary conditions of granting an injunction: "One of those conditions is, that the injunction, by stopping the acts complained of, will restore or tend to restore the party complaining to the enjoyment of that right which he has established against the defendant. I say 'restore or tend to restore,' because I conceive it is no answer to an application of this sort for the defendant to say that other persons as well as he are polluting the stream, and, therefore, the injunction will not restore the plaintiff to the enjoyment of his legal right, inasmuch as it will not prevent those other persons from continuing to pollute the water; for the plaintiff must sue each of the wrong doers separately, unless, indeed, they are acting in partnership or in concert together; and the obtaining of an injunction against any one, though it may not actually restore, does tend to restore the plaintiff to the enjoyment of his right, as it is a step towards obtaining an injunction against each of them."² And in a subsequent part of the same judgment it is said: "But whenever human beings congregate in large numbers on the banks of a stream, the inevitable consequence is, that a great quantity of sewerage is discharged into the stream, which necessarily has the effect of polluting it. Therefore, to some considerable extent, the pollution of this stream is inevitable. Not all the courts of law and equity in the kingdom can prevent it. If this injunction were granted, it would not have the effect of restoring or tending to restore the plaintiffs to the position in which they originally stood."³

§ 8. "Injunctions are either provisional or perpetual. *Provisional* injunctions are such as are to continue until the coming in of the defendant's answer, or until the hearing of the case, or until the Master has made his report. (a) *Per-*

¹ Woodman v. Robinson, 15 Eng. L. & Eq. 150.

² Wood v. Sutcliffe, 2 Sim. N. S. 166

³ 2 Sim. N. S. 167.

(a) If a statute provides, that an injunction shall be granted only where the complaint shows that the party is entitled to the relief sought; upon a motion for preliminary injunction, contrary to the usual practice, the court must inquire into its right to relieve. Hartt v. Harvey, 32 Barb. 55.

petual are such as form part of the decree made at the hearing, upon the merits, whereby the defendant is perpetually inhibited from the assertion of a (pretended) right, or perpetually restrained from the commission of an act which would be contrary to equity and good conscience. Provisional injunctions are generally divided into two kinds, *common* and *special*. *Common injunctions* (a) are those which are granted as of course, upon a defendant being in default for not appearing, or for not answering within the time limited for that purpose by the orders of the court. *Special injunctions* are those which are granted upon special grounds arising out of the circumstances of the case. Injunctions of this description are issued sometimes on the merits disclosed by the answer, sometimes on affidavits before the answer is filed, and sometimes even without notice and before the defendant has appeared.”¹ (b) Although Lord Eldon remarked, “The party hears of the injunction before he hears of the bill. I do not like granting these injunctions on motion.”² And in a case in New York it is truly said: “There are many cases

¹ 3 Dan. Ch. Pl. (Perkins' ed.) 1876.

² 1 Ves. Jr. 140.

In reference to the granting of temporary injunctions, in Massachusetts, the court remarks as follows: “Such (temporary) injunctions under the early practice of the court, as a court of equity, were granted with considerable facility, on the ground that being *ex parte*, it would not affect the merits on an ultimate hearing, and that if its operation were considerably injurious to the respondents, it was competent for them to move to dissolve it on affidavit, on application to any judge, upon short notice and cause shown. Somewhat more caution has been observed in this matter, latterly, on consideration that if such an injunction is not necessary to prevent irreparable injury, or render the purpose of the suit unavailing, it may operate injuriously to interrupt an important enterprise, and because after subpoena served, the respondent has notice of the suit, and proceeds, at the peril of all the consequences which may ensue.” Per Shaw, C. J., *Wing v. Fairhaven*, 8 Cush. 363. In a late case, a bill was brought to restrain county commissioners from opening a road because they had not assessed damages and provided for payment of them. Held, the injunction should not be perpetual but only to continue till compliance with the statute. *Champion v. Sessions*, 2 Neva. 272.

(a) The common injunction stays proceedings at law till answers or further order; the injunction in an interpleading suit stays them till further order. *Moore v. Usher*, 7 Sim. 383.

(b) “In 1 Hoffman's Chancery Practice, 78, it is said, there is nothing in our practice similar to this English practice, of issuing the writ upon the presumed admission of the defendant, by his default, of the plaintiff's right to it. A special application is always made to the Chancellor, Vice-Chancellor, or

in which the complainant may be entitled to a perpetual injunction on the hearing, where it would be manifestly improper to grant an injunction *in limine*. The final injunction is in many cases matter of strict right, and granted as a necessary consequence of the decree made in the cause. On the contrary, the preliminary injunction before answer is a matter resting altogether in the discretion of the court, and ought not to be granted unless the injury is pressing and the delay dangerous.”¹

§ 9. The object of a preliminary injunction is to prevent some threatening irreparable mischief, until an opportunity for a full and deliberate investigation.² It will not be granted when the main question in the case is being investigated by a court of law. The right must be first settled. So, although equity takes jurisdiction to restrain waste by injunction, and in some particular cases to obtain a discovery and account, and, having for these objects obtained jurisdiction, proceeds, in order to avoid multiplicity of suits, to compensate for damages done; yet the jurisdiction itself must rest, in the first instance, on the necessity for an injunction, or discovery and account.³

§ 10. It is held that the complainant in a bill for an injunction should always be ready to prove the allegations in his bill.⁴ And that an injunction will not be granted where the material allegations are only on information and belief.⁵

§ 11. All special injunctions must either stand or fall according to the merits which they possessed at the time when they were granted.⁶

§ 12. The following enumeration is given in an approved

¹ Per Walworth, Chanc., N. Y. Printing, &c. v. Fitch, 1 Paige, 98.

⁴ Bradford v. Innes, 1 Hen. & M. 7.

² Attorney-General v. Paterson, 1 Stockt. 624.

⁵ Waddell v. Bruen, 4 Edw. Ch. 671;

Armstrong v. Sanford, 7 Min. 49.

⁶ Per V.-C., India, &c., 17 Sim. 15.

³ Leforge v. West, 2 Cart. 514.

Master, and the merits of the application are examined by him. Thus a great number of the English rules become inapplicable.” 3 Dan. 1877, n. 1.

work, of the various cases in which this remedy may be applied.

§ 13. "To stay proceedings in the courts of law, in the spiritual courts, the courts of admiralty, or in some other court of equity; to restrain the indorsement or negotiation of notes and bills of exchange, the sale of land, the sailing of a ship, the transfer of stock or the alienation of a specific chattel; to prevent the wasting of assets or other property pending litigation; to restrain a trustee from assigning the legal estate, from setting up a term of years, or assignees from making a dividend; to prevent the removing out of the jurisdiction, marrying, or having any intercourse which the court disapproves of, with a ward; to restrain the commission of every species of waste to houses, mines, timber, or any other part of the inheritance; to prevent the infringement of patents, and the violation of copyright either by publication or theatrical representation; to suppress the continuance of public or private nuisances; and by the various modes of interpleader, restraint upon the multiplicity of suits, or quieting possession before the hearing, to stop the progress of vexatious litigation. These, however, are far from being all the instances in which this species of equitable interposition is obtained. It would indeed be difficult to enumerate them all; for in the endless variety of cases in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or the continuance of some act of the defendant, a court of equity administers it by means of the *writ of injunction*." ¹ And by another writer it is said, "The extent to which the jurisdiction may be carried is not marked out by any adjudged case, and from the nature of things it must forever remain undefined." ² (See § 17.)

§ 14. The court will not grant an injunction, unless *real injury* is to be apprehended.³ (See § 5.) And an injury, not alleged to be *continuing*, is held no ground for an injunction.⁴ Thus an injunction will not be granted to restrain a foreign

¹ 1 Waterman's Eden, 10.

² Willard's Equity Juris. 408. See Cobb v. Smith, 16 Wis. 661.

³ Watrous v. Rodgers, 16 Tex. 410.

⁴ Coker v. Simpson, 7 Cal. 340.

corporation, against which the plaintiff has an attachment, judgment, and execution, from making a mortgage, unless it appears that the plaintiff will be thereby damnified; nor, consequently, from mortgaging property which the plaintiff, as a judgment creditor, could never reach.¹ But, notwithstanding the *denial of title*, an injunction may issue to stay irreparable mischief or waste.² (And *insolvency* in the defendant, in a bill for an injunction to prevent irreparable damage, should have influence with the court, according to its degree.) So the allegation in a complaint, that the defendants justified under an adverse claim, will not, in any sense, prejudice the right to an injunction.³ For the purpose of quieting a possession, or preventing a multiplicity of actions, or where the value of the inheritance is in jeopardy, or irreparable mischief is threatened, in relation to either mines, quarries, or woodland, equity will interfere, by injunction, even against a person acting under a claim of right.⁴ Nor does an allegation, that the defendant claims some fictitious right, prejudice the plaintiff's right to an injunction.⁵ And the *amount* of actual injury, where a right is involved, or where adverse use might ripen to a right, is held not to be material. Thus the defendants, owners of a mill upon a canal of the plaintiffs, were authorized by the canal charter to draw water for the purpose of condensing steam only. The water being used for other purposes, the plaintiffs brought an action and recovered nominal damages. The defendants attempted, unsuccessfully, to arrest the judgment, which was affirmed on error. The defendants still continuing to use the water as before, the plaintiffs apply for an injunction. The answer relied upon acquiescence on the part of the plaintiffs. Held, but for this defence an injunction should issue.⁶

§ 15. In the case of *Campbell v. Scott*,⁷ Sir L. Shadwell, V. C., remarked: "The only question is whether there has been such a *damnum* as will justify the party in applying

¹ *Rogers v. Michigan, &c.*, 28 Barb. 539.

² *United States v. Parrott*, 1 McAll. C. C. (Cal.) 271.

³ *Mercea, &c. v. Fremont*, 7 Cal. 317.

⁴ *Kerlin v. West*, 3 Green, Ch. 448.

⁵ *Tuolumne, &c. v. Chapman*, 8 Cal. 392.

⁶ *Corning v. Troy, &c.*, 34 Barb. 485; *The Rochdale, &c. v. King*, 2 Sim. N. S. 78; *M'Cord v. Iker*, 12 Ohio, 387.

⁷ 11 Sim. 39.

to the court, because *injuria* there clearly has been. What has been done is against the right of the plaintiff. Now, in my opinion, he is the person best able to judge of that himself; and if the court does clearly see that there has been anything done which tends to an injury, I cannot but think that the safest rule is to follow the legal right and grant the injunction." (a)

§ 16. In general, clear legal or equitable rights, free from reasonable doubt, must be satisfactorily shown, to authorize a preliminary injunction.¹ "It is an appeal to the extraordinary power of the court, and the plaintiffs are bound to make out a case showing a clear necessity for its exercise."² (b) It is "the duty of the court rather to protect acknowledged

¹ Scott v. Burton, 2 Ashm. 312; ² Per Johnson, J., Auburn, &c. v. Snowden v. Noah, Hopk. 347; Steam-Douglass, 12 Barb. 555. boat, &c. v. Livingston, 3 Cow. 713.

(a) So, in a later case, Sir W. Page Wood, V. C., says: "While I do not wish to encourage application to the court upon trivial matters, on the other hand, I am far from holding out the notion that anything like large or heavy damages must be recovered before the plaintiff can be assisted." He however inserted in the order, enjoining the pollution of a stream, the words, "to the injury of the plaintiff," remarking further, "there may be means of purifying the stream before it reaches the plaintiff's works, but if it does reach them in a polluted state, he has a right to be protected." Lingwood v. Stowmarket Co., Law Rep. (Eng.) Eq. January, 1866, pp. 77-8.

So in case of an alleged breach of covenant, the question arising as to the amount of damages, the court remarked: "Whether this ground of non-interference, can be applicable to a case of this peculiar description, may be matter deserving of some consideration. The object of the covenant was to prevent, for all future time, any obstruction to the view from the backs of the houses — by buildings or trees above a certain height. Any building erected or any tree permitted to grow above this height, would be a breach, and yet the damage might scarcely be appreciable. If, then, it were necessary to wait until 'substantial injury,' were sustained, that period might never arrive, although violations might be continually occurring." Per Lord Chelmsford, L. C., Western v. MacDermott, Law Rep. (Eng.) Eq. February, 1867, p. 75.

And in another late case it is said: "In determining whether the injury is serious or not, regard must be had to all the consequences, not merely to the comfort or convenience of the occupier, but, also, to the effect, upon the value of the estate, and upon the prospect of dealing with it to advantage." Per Sir G. J. Turner, L. J., Goldsmid v. The Tunbridge, &c., Law Rep. (Eng.) Eq. June, 1866, p. 354.

(b) "The granting of an injunction *ex parte* is the exercise of a very extraordinary jurisdiction, the effect of which, in every case in which it is asked, is almost alarming." Per Lord Langdale, M. R., Merborough v. Bomer, 7 Beav. 130.

rights than to establish new and doubtful ones.”¹ At least, an injunction requires a strong *prima facie* case of title.² Thus an injunction will not be granted to restrain the prosecution of a public work before the coming in of the answer, where it does not clearly appear that the complainant’s rights have been violated.³

§ 17. But it is also held, that the granting and continuing of injunctions, although requiring judicial authority, rest in the discretion of the court, to be governed by the nature of the case.⁴ (See § 13.) “It is not usual, nor ordinarily is it proper, to inquire into the right of the court to grant relief, upon an application for an injunction; still less to refuse an injunction when the question of jurisdiction is doubtful and when refusing it may produce injury to the party applying.” (But the general rule is modified by the express provisions of the New York Code.)⁵ And, on the other hand, in the absence of special circumstances, equity will not interfere to control or limit the exercise of a discretionary power.⁶

§ 18. It is said, that an application to a court of chancery, for the exercise of its prohibitory powers or restrictive energies, must come recommended by *the dictates of conscience*, and be sanctioned by *the clearest principles of justice*.⁷ And an injunction requested upon principles of equity and justice should never be refused in the first instance.⁸ If there be no equity in the bill, there can be no injunction.⁹ Either the want of an equitable title, or the establishment of a legal title, is a sufficient reason for denying equitable relief.¹⁰ And the same general principle is further expressed in the propositions, that an action for damages is a matter of *right*, but

¹ Per Sargent, J., *Burnham v. Kempton*, 44 N. H. 92; *Booth v. Driscoll*, 20 Conn. 555.

² *Grey v. Ohio, &c.*, 1 Grant, 412.

³ *Elmslie v. Delaware, &c.*, 4 Whart. 424.

⁴ *Roberts v. Anderson*, 2 John. Ch. 202; *Tucker v. Carpenter*, 1 Hemp. 440; *Burchard v. Boyce*, 21 Geo. 6; *Jessel v. Chaplin*, 37 Eng. L. & Eq. 472; *Kneedler v. Lane*, 3 Grant, 523; *State v. Judge*, 16 La. An. 233.

⁵ Per Mullin, J., *Ballard v. Fuller*, 32 Barb. 68.

⁶ *Kekewich v. Marker*, 5 Eng. L. & Eq. 129.

⁷ *Maryland, &c. v. Schroeder*, 8 Gill & J. 93; *Clayton v. Yarrington*, 33 Barb. 144.

⁸ *Lee v. Montgomery, Walker*, 109.

⁹ *Smith v. Lard*, 28 Geo. 585.

¹⁰ *McAffee v. Lynch*, 26 Miss. 257.

an injunction is of *grace*.¹ (See § 19.) That the right to an injunction is not *ex debito justitiæ*, but the application is addressed to the sound conscience of the Chancellor acting upon all the circumstances belonging to each particular case.² That the Chancellor has the right to require a full and candid disclosure of all the facts, and, if there appears in the proceedings sufficient to show that this has not been made, he may properly refuse to grant an injunction.³ And that the process of injunction should be applied with the utmost caution. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which on just and equitable grounds ought to be prevented.⁴ So an injunction is a secondary process (except it be for the prevention of torts), and must be asked in aid of some primary equity, which must be disclosed in the same bill that prays it.⁵ (a) (See § 2.)

§ 19. In conformity with this general requisition of *equity* in the case presented, a bill of injunction may be dismissed on motion, without an answer, for the want of equity on its face.⁶ So where the answer denies all the equity, if any, of the bill, a preliminary injunction should not be granted.⁷ A familiar application of this principle is the case of *usury*. Thus, in New York, on a bill filed before the act of the 15th of May, 1837, to prevent usury, went into operation, to restrain a suit at law upon a usurious contract, a preliminary injunction was refused, the plaintiff not having offered to pay the amount equitably due upon the contract, with lawful interest.⁸ (b) And it is held that the equity relied upon

¹ Grey v. Ohio, &c., 1 Grant, 412.

² Reddall v. Bryan, 14 Md. 444.

³ *Ib.*

⁴ Morse v. Machias, &c., 42 Maine, 119.

⁵ Washington v. Emery, 4 Jones Eq.

29; Patterson v. Miller, *ib.* 451.

⁶ Richardson v. Prevo, Breese, 167.

⁷ Crandall v. Woods, 6 Cal. 449.

⁸ Mitchell v. Oakley, 7 Paige, 68; Rogers v. Rathbun, 1 John. Ch. 367.

(a) In a late case, an injunction was refused, upon the allegation of an imperfect assignment of securities by one deceased to a trustee for his son, without delivery, and to the prejudice of his widow. *Jones v. Drake*, (Pa.) Leg. Intell. December 27, 1867.

(b) Although a case of "atrocious fraud," and the party to it "ought unquestionably to be sent to the State prison for swindling." Per Walworth, Ch., 7 Paige, 68.

must relate *immediately* to the subject of complaint. Thus it is no ground for restraining a railroad from the completion of their works, that they have violated a contract connected therewith.¹ So an injunction will be granted only in order to prevent violation of a positive right. (See § 18.) Thus, where commissioners were appointed by statute to ascertain who were entitled under a preëmption law, the court refused to grant an injunction at the instance of one who claimed to be injured by their decision, as it was mere matter of favor, and not of right.² So an injunction will not be granted, in favor of a party claiming to exercise a right granted by an act of the legislature clearly unconstitutional.³ And it has been held in Pennsylvania, that courts have chancery jurisdiction to enjoin such acts only as are *contrary to law*, and not merely contrary to equity.⁴ (a) Though in a later case it is held, that, in Pennsylvania, equity is so much a part of the law, that the word law often means both, or either. Hence acts contrary to equity, as well as those contrary to law, may be enjoined.⁵ So where a statute has made provision for all the circumstances of a particular case, no relief can be afforded by injunction, although the statute may conflict with the notions of natural justice and equity entertained by a court of chan-

¹ *Gallagher v. Fayette, &c.*, 38 Penn. 102.

² *Bell v. Payne*, 2 Stew. 414.

³ *Moor v. Veazie*, 31 Maine, 360.

⁴ *Hagner v. Heyberger*, 7 Watts & Serg. 104.

⁵ *Stockdale v. Ullery*, 37 Penn. 486.

(a) In this case, Sergeant, J., remarked — (7 W. & S. 107): “The object of this clause was to furnish adequate redress in cases where, although an action at law was maintainable, yet the injury might be irreparable. Thus, if there were sufficient ground to believe, in consequence of threats or otherwise, that an individual was about committing waste in timber, &c., or that a corporation was grossly abusing its privileges, or that a public officer was destroying or about to destroy public books and papers, or materially injure the public interests, or embezzle or waste the public money or properties, or in short, any act was doing or likely to be done, for which damages could not perhaps compensate, and the legal redress might be too tardy or ineffectual, which was in the nature of misfeasance, nuisance, waste, spoil, or destruction to property, and the act was contrary to law and injurious to the community or individuals, a summary remedy is given by the strong arm of an injunction to stop it, or prevent its being done. But is that the case here? Is the defendant exercising the office” (that of school director) “contrary to law, *non constat*, and we cannot collaterally inquire into it? He is exercising the office *de facto* under color of right, and there has never been any proceeding against him at law to have him ousted, and he can only be ousted by writ of *quo warranto*.”

cery.¹ It is held that chancery will refuse an injunction, if the party propose to do equity in the presence of the court.²

§ 20. The *equity* of a claim, which justifies the summary remedy of injunction, necessarily precludes fault or wrong on the part of the plaintiff himself. Thus, upon an application for injunction against the use of a trade-mark, it was objected that the plaintiff falsely and fraudulently represented that the article was protected by a patent; and Wood, V. C., remarked: "It is very material that persons coming here for injunctions should be very careful what representations they have made. They must satisfy the court that in their own representations there has been nothing of fraud." So the court will not interrupt a public work, in behalf of one whose land has been taken without compensation, where his own acts have rendered his application fraudulent and against good faith.³ And, in a case relating to the construction of a railroad, the court remark: "The case was one for compensation at law, and not to be remedied by injunction to enforce abatement of the road as a nuisance, or the perpetual restraint of its use. It was constructed under a contract with a stipulation to pay damages for consequent injury, and with a tribunal agreed upon for their assessment. To permit the party to construct their road under an amicable contract, after a solicited withdrawal of compulsory proceedings, which would in all probability have resulted in giving the right, subject only to the condition of the payment of damages, and then ask to destroy the whole because of a non-compliance in some particulars, is a course so contrary to equity as to be a vain effort."⁴

§ 21. And the same consideration of equity is sometimes so applied as to include the rights and interests of third persons. Thus, in a case relating to a watercourse, it was said: "In cases of such a nature as this, (the court) must have regard not only to the dry strict rights of the plaintiff and defendant, but also to the surrounding circumstances; to the rights or

¹ Glenn v. Fowler, 8 Gill & J. 340.

² Behn v. Young, 21 Geo. 207.

³ Carson v. Coleman, 3 Stockt. 106.

⁴ Per Thompson, J., Pusey v. Wright, 31 Penn. 395-6.

interests of other persons, which may be more or less involved.”¹

§ 21 a. The equity of the plaintiff's case may consist in the *mode* adopted by the defendant of exercising a certain right, rather than in the want of such a right itself; involving the necessity of this summary interference to reconcile the conflicting claims of the respective parties. Thus, where the defendant was entitled to a water-power supplied by a waste weir from a public canal, in a bill for injunction brought by the canal company, the court remark: “The defendants claim that during the time that business is suspended on the canal they have a right to have the water flow in its original channel; but they have not taken the right method of asserting their right, if they have any. The plaintiffs are in possession of the water for the purpose of their canal, and the time during which they need it for the actual business, and the quantity which they need to keep in the canal during the winter season when business is suspended, are necessarily quite indefinite. It is impossible, therefore, that the defendants can be allowed to define for themselves the plaintiffs' right, and interfere with their possession. They insist on opening the weirs and helping themselves according to their own judgment; but this would be a lawless mode of vindicating their rights, and it cannot be allowed. If the defendants have any right to the water beyond what the plaintiffs are willing to concede to them, they must bring their bill or action to have those rights defined before they can be enforced.”²

§ 22. And an injunction is sometimes refused upon the ground that it would cause great injury to the defendant.³

§ 23. Where a party has *a remedy at law*, he cannot come into equity, unless, from circumstances not within his control,

¹ Wood v. Sutcliffe, 2 Sim. N. S. 164.

² Per Lowrie, J., Erie, &c. v. Walker, 29 Penn. 173.

³ Wood v. Sutcliffe, 2 Sim. N. S. 167.

he could not avail himself of his legal remedy;¹ (a) nor for the assertion of a right, the existence or non-existence of which is properly determinable at law, and the exercise of which will do no injury to the party denying it;² nor where it is not essential to secure the party's rights, and the object can be effected by filing a notice of *lis pendens*;³ nor where there is a remedy at law, and it does not appear but that damages at law would be realized, and there is no danger of irreparable injury.⁴ More especially, where the matter of the bill itself shows that the plaintiff has an adequate remedy at law, an injunction on the bill cannot be sustained.⁵ In such cases, an injunction will not at least be granted, until the petitioners have established their right to redress by an action at law.⁶ Thus the principle upon which an equity court interferes by injunction, in cases both of public and private *nuisance*, is the inadequacy of the remedy at common law; and it is on the ground of injury to property that this jurisdiction rests.⁷ So in case of devise to the widow of the testator, during her widowhood, or until their youngest child attained the age of twenty-one years, for the support of herself and their children, with remainder to the children, in fee, subject to dower; upon a bill filed by the widow and the children, charging against the defendant an unlawful and violent entry upon the land, taking the products thereof, and depriving the complainants of their means of support and maintenance, and praying that he might be compelled to surrender the land to them, and for an injunction and a receiver of the

¹ *Nicolson v. Hancock*, 4 Hen. & M. 491; *Robinson v. Byson*, 1 Bro. C. 588; *Wallace v. McVey*, 6 Ind. 300.

² *Doughty v. Somerville, &c.*, 3 Halst. Ch. 51.

³ *Waddell v. Bruen*, 4 Edw. Ch. 671.

⁴ *Warne v. Morris, &c.*, 1 Halst. Ch. 410.

⁵ *Mallett v. Weybossett, &c.*, 1 Barb. 217.

⁶ *Arnold v. Klepper*, 24 Mis. 273.

⁷ *Atty., &c. v. Sheffield, &c.*, 19 Eng. L. & Eq. 639.

(a) That full compensation can be had at law, "is the great rule for withholding the strong arm of the Chancellor." Per Thompson, J., *Pusey v. Wright*, 31 Penn. 396. The question is said to depend wholly upon the character of the case. *Watson v. Sutherland*, 5 Wall.; Amer. Law. Reg. November, 1867, p. 61.

This objection to equitable interference may sufficiently appear by the bill itself; as where the bill alleges, that the defendant, under a pretended claim of a right of way, under a pretended order of the board of supervisors, has entered the plaintiff's close, torn down and destroyed the fences, and threatens to do it as often as they are erected. *Leach v. Day*, 27 Cal. 643.

rents and profits, *pendente lite*, it was held, that the facts charged did not show that the defendant was committing irreparable damage to the property, to prevent which an injunction was necessary; that the remedy at law was ample and complete, either by action of trespass, ejectment, or, under the statutes, for a forcible entry.¹ So on a bill in equity, brought by the owner of a mill-dam, to restrain a town from opening certain sluiceways therein, on the ground that the dam, by raising the water over certain highways, is a nuisance, a temporary injunction will not be granted, or, if granted on application *ex parte*, will be dissolved; when it appears that the refusal to grant, or the dissolution of the injunction, cannot lead to any injury or cause any loss to the plaintiff which cannot be repaired in damages, or affect the merits of the controversy on a trial in due course.² So, in general, a purchaser of land, who has a full and complete remedy at law on the covenants in his deed, cannot have an injunction against his vendor to restrain him from collecting the purchase-money;³ though a person who does not reside and has no property in the State may be restrained from collecting a note given for land to which he had no title, notwithstanding the remedy at law on a covenant of warranty.⁴ (See *Title*.) So, in Georgia, the remedy for the opening of an old road by the superior courts is by *certiorari*, not by injunction against the commissioners who seek to execute the order.⁵ (a)

¹ *Pfeltz v. Pfeltz*, 14 Md. 376.⁴ *Green v. Campbell*, 2 Jones Eq.² *Wing v. Fairhaven*, 8 Cush. 363. 446.³ *Wilkins v. Hogue*, 2 Jones Eq. ⁵ *Nichols v. Sutton*, 22 Geo. 369.

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(a) In general, *certiorari* is the process for revising the proceedings of inferior boards or tribunals of special jurisdiction. Injunction is not the remedy, unless necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding complained of is valid on its face, and to be avoided only by extrinsic evidence. Thus a bill is bad on demurrer, to enjoin judgments rendered by the mayor of St. Louis for the amount of alleged benefit to the property of the plaintiff from the opening of a street, upon the ground of want of authority in the mayor, and various defects and irregularities in the proceedings. There being a plain, adequate and complete remedy at law, equity has no jurisdiction. *Ewing v. St. Louis*, 5 Wall.; Amer. Law Reg., December, 1867, p. 121.

So one, whose land has been taken for a street, may review the proceedings of the commissioners by *certiorari*, or may put the title of the public, acquired under them, in issue by a common-law action, but not by an injunction. *Kelsey v. King*, 32 Barb. 410.

Appeal may also be set up as a legal mode of redress, which precludes the

§ 23 a. The question has arisen, whether the remedy of injunction would lie in case of an agreed *penalty* or *forfeiture*. It has been held that the breach of a restrictive covenant in a lease may be enjoined, though secured by forfeiture of the lease and a penalty.¹ But where the plaintiff agreed with the defendants, a railroad company, that they might enter upon his land and build, and have the damages settled by award within a year, and that they should be paid within sixty days; if not, the license to cease, and all rights of the company, and its interest in the fixtures, to be as if it had entered in its own wrong: held, a case of forfeiture, not to be enforced by injunction against an entry upon the lands.² So in an early case the plaintiff let a farm to the defendant, at an annual rent, part of it pasture, the defendant covenanting not to break up or plough any part of it, and, if he did, to pay at the rate of twenty shillings per acre per annum. Injunction refused, because the parties had agreed the damage and set a price for ploughing. The court remarked that, if the defendant was plaintiff against paying the twenty shillings, they would

¹ Barret v. Blagrove, 5 Ves. 555. ² Coe v. Columbus, &c., 10 Ohio N. S. 372.
See Aylet v. Dodd, 2 Atk. 239; Benson v. Gibson, 3 ib. 396.

equitable remedy of injunction. In case of a bond for costs filed by a non-resident, and an appeal of the suit till the termination of which the costs are not payable; if an action is brought upon the bond in another court, the obligor may, by motion in the former suit, stay proceedings in the latter till the appeal is decided. Otherwise, if he unsuccessfully resists the suit on the bond. Van Vleck v. Clark, 38 Barb. 316.

The plaintiffs were administrators upon the estate of A, who had guaranteed, by indorsement, a note of B and Co. to C. The note was presented against the estate of A, and allowed by the commissioners. Before return of their report to the probate court, C took a new note signed by the members of the firm, and gave up the old one. The commissioners, not knowing the fact, reported in favor of the claim, and the plaintiffs, also without notice, failed seasonably to appeal. Learning the facts, they afterwards refused to pay the claim, and C brought a suit on the probate bond. Upon a bill for injunction of this suit; held, the failure to appeal was no bar to relief, and that the proper remedy was an injunction, and not an application to the probate court for an opening of the commission and a rehearing. Weed v. Grant, 30 Conn. 74.

The (Massachusetts) Supreme Court has equitable jurisdiction of a private nuisance, notwithstanding the remedy, provided by Gen. Sts. c. 145, sect. 16, of an application for leave to file an information in the nature of a *quo warranto*, for injury to private rights or interests, by the exercise, on the part of a private corporation, of a franchise or privilege not conferred by law. Fall, &c. v. Old, &c., 5 Allen, 221.

not relieve him.¹ And the general distinction is laid down, that breach of condition forfeits the estate. Breach of covenant is ground either of injunction or an action for damages.²

§ 24. A demand growing out of an illegal transaction, which cannot be recovered or enforced directly, cannot be made the foundation of a proceeding in chancery for an injunction against a legal demand.³

§ 25. The interference of a court of equity by injunction sometimes depends upon statutory provisions either for this or other remedies. Upon this point it is said: "The remedy by injunction is, notwithstanding the (statutory) provision for its exercise, only such in the absence of an adequate *legal remedy*." ⁴

§ 26. Where a statute provided a specific remedy against a plank-road for neglect to repair, it was held that equity would not enjoin the collection of tolls till the repairs were made.⁵ So a bill for injunction was filed, alleging that the complainant made a contract with the defendants, a railroad company, by which he was to convey to them a right of way over his land, and a tract for a depôt; and that they had purchased other grounds and intended to use them for a depôt, and abandon those of the complainant. The defendants denied such abandonment. Held, the remedy of the complainant was by an action at common law, or under the railroad act.⁶

§ 27. The remedy by injunction does not preclude other remedies for the same injury. Thus, in California, a mortgagee may maintain replevin for fixtures, although the Practice Act, sect. 261, authorizes an injunction against their removal.⁷

¹ Woodward v. Gyles, 2 Vern. 116.
See Rolfe v. Peterson, 6 Bro. Parl. 470.

² Woodruff v. Water, &c., 2 Stockt. 489.

³ Pond v. Smith, 4 Conn. 297.

⁴ Per Thompson, J., Scheetz's, &c., 35 Penn. 95.

⁵ Com. v. Wellsboro', &c., 35 Penn 152.

⁶ Gallagher v. Fayette, &c., 38 Penn. 102.

⁷ Sands v. Pheiffer, 10 Cal. 258.

§ 28. In *Langton v. Horton*,¹ a judge of the Court of Queen's Bench had ordered an issue to try the title to property in the hands of a sheriff, by virtue of the Interpleader Act, 1 & 2 Wm. IV., c. 58, and 1 & 2 Vict. c. 45. The plaintiffs, claiming the property, apply for an injunction against these proceedings. It appeared that the case involved the validity of an assignment of a prospective cargo. Held, as this was a matter peculiarly of equitable jurisdiction, an injunction should be granted, the acts applying only to cases of strictly legal rights.

§ 29. In the case of *Baldwin v. Buffalo*,² the distinction is taken, that, where the proceedings in a street case are illegal, and therefore inoperative and void, *certiorari* is the proper remedy, unless the proceedings in the subordinate tribunal, or the official acts of public officers, affecting the title to real estate, lead, in their execution, to the commission of irreparable injury to the freehold, or to a multiplicity of suits; or unless the adverse claim to the land is valid upon the face of the instrument or the proceedings complained of, and extrinsic facts require to be proved to establish the invalidity or illegality.

§ 30. Courts of equity have no *controlling, supervising, or superintending* power over courts of law, and will neither arrest nor interfere with their proceedings on the ground that their decisions were *erroneous*; much less stay or interfere with them, in anticipation of such erroneous decisions.³ (See § 60.) Thus, if a city ordinance be in conflict with any commercial regulation of Congress, a party prosecuted under it has an adequate remedy at law. He may plead that fact in defence in the city court, and, if the decision be against him, he may appeal and then have a writ of error to the Supreme Court of the United States. Therefore the Circuit Court of the United States would not grant relief by injunction even if it had the power.⁴

¹ 3 Beav. 464.

² 29 Barb. 399. See the *Mayor, &c., v. Meserole*, 26 Wend. 132; *Heywood v. Buffalo*, 14 N. Y. 534.

³ *Hood v. New York, &c.*, 23 Conn. 609; *Richardson v. Baltimore*, 8 Gill, 433.

⁴ *Rogers v. Cincinnati*, 5 McL. 337.

§ 31. With more special reference to the character of the injury in question, as *irreparable* by an action at law ; where the injury is not susceptible of being adequately compensated in damages, or such as from its continuance or permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise prevented, as where loss of health, loss of trade or business, destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful acts ; or where an easement or servitude is annexed by grant, covenant, or otherwise to a private estate : equity will interfere by injunction in furtherance of justice and the violated rights of the party, or to protect the due and quiet enjoyment of the easement against encroachments.¹ (a)

§ 32. The omission of the charge of irreparable mischief would not be a defect in a bill otherwise good ; because the court must be satisfied, from a statement of the grievances, that the injury would be irreparable, and it is enough if the court can discover this from the allegation of facts.² On the other hand, mere allegation of danger of a great and irreparable injury is not enough ; facts must be stated, to satisfy the court of the existence of such danger.³

§ 33. It is held, that, if the court interfere on the ground that the complainant has not an adequate remedy at law, it should do so by a direct decree to that effect, and not by injunctions issued at a preliminary stage of the proceedings.⁴

§ 34. In refusing to interfere by injunction, a court of equity takes notice of other remedies within the power of the party complaining, than that of an action at law. Thus, in case of a bill by a part of the directors of an insurance com-

¹ Webber v. Gage, 39 N. H. 182.

² Davis v. Reed, 14 Md. 152.

³ Branch, &c. v. Yuba, 13 Cal. 190.

⁴ Akrill v. Selden, 1 Barb. 316.

(a) In a late case it is said, "It cannot be contended that those who are minded to erect a building that will inflict an injury upon their neighbor, have a right to purchase him out without any Act of Parliament—even though he be willing to take compensation, if he is not ready to submit to the valuation of a jury." Per Sir W. Page Wood, Law Rep. (Eng.) Eq. July, 1866, p. 245.

pany, constituted by deed, against another director, alleging misconduct, it appeared that the plaintiffs had not made use of the regulating authority given by the deed, and an injunction which had been granted was dissolved.¹ So, in a case relating to a watercourse, it appeared that other parties, who had polluted the stream in the same way, being threatened with suits, entered into an agreement with the plaintiffs to make a certain annual payment for the privilege of doing it; and the court held this to be sufficient proof that the plaintiffs had an adequate remedy at law, and were not entitled to an injunction.²

§ 35. It is sometimes said to be the general, though not universal rule, that an action at common law should be brought before an application is made for an injunction.³ So it is held, that, if the title of the complainant is denied, he must show former recoveries or long possession, in the case of patents; and, in case of waste and trespass, that there are no facts to warrant the denial; or the injunction will be refused till the disputed questions of title are settled at law.⁴ But the prevailing rule would seem to be otherwise; and it is even held that a complainant, who has established his right at law, stands in no better position in respect to obtaining an injunction, than one whose right is not disputed.⁵

§ 36. The bearing of a legal title, or the want of, or a controversy respecting such title, upon a petition for injunction, is found stated in various forms, apparently not quite reconcilable with each other. While it is sufficient ground for refusing an injunction, that the party has an adequate remedy at law, it is also held that there is no case, in which equity has granted a perpetual injunction to a plaintiff to protect him in the enjoyment of a naked legal right, which he and those under whom he claims have stipulated by solemn deeds not to exercise. Legal rights must be asserted by legal means, and

¹ *Ellison v. Bignold*, 2 Jac. & W. C. C. (Cal.) 271. See *Union, &c. v. Kerr*, 2 Md. Ch. Dec. 460.

² *Wood v. Sutcliffe*, 2 Sim. N. S. 168. ⁴ *Perry v. Parker*, 1 W. & M. 280.

⁵ *Quackenbush v. Van Riper*, 2 *United States v. Parrott*, 1 McAll. Green, Ch. 350.

courts of equity never lend their aid where equity and justice do not imperiously demand it.¹ A party seeking to restrain the exercise of a legal right must show substantial grounds for doubting its existence.² A legal title is properly tried at law, and equity interferes only to protect an equitable against a strictly legal title, or to compel a discovery for such protection. Hence an ejectment at law will not be enjoined, except upon some peculiar grounds of equity, clearly and expressly appearing in the bill; as where the bill shows a clear legal title in the plaintiff, and a complete defence to the ejectment.³

§ 37. Notwithstanding the general rule, that the party applying for an injunction must be remediless at law, the court of equity is not exceeding its functions, in deciding a purely legal question arising in a suit before it, either with or without legal assistance, but ought to decide such a question where the controversy and material facts are plain.⁴ And an injunction may be granted where the defendant, against whom there is otherwise a good remedy at common law, is insolvent, or about to abscond.⁵

§ 38. As may be gathered from what has been already stated, with reference to the grounds which justify the interference of a court of equity by injunction; it is held, that, where a petition for an injunction does not show that the party applying for it is likely to be injured by the proceeding complained of, the injunction ought not to be granted; or, if granted, it ought to be dissolved, on motion.⁶ Also that *past injuries* are not in themselves ground for an injunction; but when there is a continuance of an injury, and a right to continue it is claimed, an injunction may, in a proper case, be issued to restrain the continuance.⁷

§ 39. Another principle is, that, where either party may suffer by the granting or withholding an injunction, the rule

¹ *Bosley v. McKim*, 7 Har. & J. 468.

² *The Oxford, &c.*, 9 Hare, (41 Eng. Cha.) 441.

³ *Philhower v. Todd*, 8 Stockt. 54.

⁴ *Shrewsbury, &c. v. Stour, &c.*, 21 Eng. Law & Eq. 628.

⁵ *Ponder v. Cox*, 28 Geo. 305.

⁶ *Cameron v. White*, 3 Tex. 152.

⁷ *Society, &c. v. Morris Canal, Saxt.* 157.

in equity requires the court to balance the inconveniences likely to be incurred by the respective parties, by means of the action of the court, and to grant or withhold the injunction according to a sound discretion.¹ Where an injunction might cause irreparable damage to the defendant, in the event of the plaintiff's not being exclusively entitled, but the damage sustained by the plaintiff, in the event of establishing his title, allows of compensation, the injunction will be refused.² At least, an injunction should not issue where the benefit to one party is but small, while it will operate oppressively and to the annoyance and injury of the other, unless the wrong is so wanton and unprovoked as to deprive the party of any claim to such consideration.³ And though the mere inconvenience of granting an injunction is not *per se* ground for refusing it; this corroborates the objection arising from unreasonable acquiescence in, or originally inviting, the injury complained of.⁴ (a)

§ 40. Equity may enjoin any act, from which irreparable injury to *public property* may result.⁵

§ 41. In cases of imminent danger of injury, a temporary injunction will be granted on filing amendments to a bill after appearance, but the injunction will be accompanied with an order to show cause why the bill should not be amended, and why the injunction should not be continued.⁶

§ 42. It is said that slight infringements of rights in respect of land, by a *large company of persons*, ought to be watched with a careful eye, and repressed with a strict hand, by a court of equity, where it can exercise jurisdiction.⁷ (See *Corporations*.) But an injunction will not be granted for every

¹ Grey v. Ohio, &c., 1 Grant, 412.

⁵ Putnam v. Valentine, 5 Ham. 187.

² Hartridge v. Rockwell, Charl. R. M. 260.

⁶ Hays v. Heyr, 4 Sandf. Ch. 485.

³ Jones v. Newark, 3 Stockt. 452.

⁷ Per Sir J. L. Knight Bruce, L. J., Atty., &c. v. Sheffield, &c., 19 Eng. L.

⁴ Pettibone v. LaCrosse, &c., 14 Wis. 443.

& Eq. 639.

(a) Where there is a balance of inconveniences, and a small amount involved, the court will not enjoin, but require an account pending the action at law. Cory v. Yarmouth, &c., 3 Hare, (25 Eng. Cha.) 593.

wrongful or unconstitutional act of individuals *or corporations*.¹ Thus, where a city ordinance directed the plaintiff's lots to be filled and the expense assessed, an injunction was refused, on the ground that the injury was not shown to be irreparable, so that an action at law would not be an ample remedy, and that the assessment, if illegal, could not be collected.² So where the plaintiffs, for the purpose of preventing the defendants from laying their pipes from their gas-works into a city, purchased a lot of land so situated upon the highway, that it was necessary that the defendants' main pipe should pass through that part which lay within the limits of the highway, and the defendants laid their pipes across it, and avowed their determination to maintain it there; held, as the substantial controversy was in relation to the right to use the highway irrespective of any title to the soil, and as the defendants were liable in trespass for any damage done to the land, an injunction ought not to be granted.³

§ 43. To entitle the plaintiff to an injunction, he must not be guilty of any improper *delay* in applying for relief.⁴ And this, although the application be on behalf of the attorney-general.⁵ "If a party is guilty of laches or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to equitable relief—more especially where a party, being cognizant of his rights, does not take those steps to assert them which are open to him, but lies by, and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome character."⁶ "The court looks most minutely to the time in which (the parties) have permitted the matter to proceed, and will not allow them to obtain an injunction in the absence of the other party, when they have themselves, for some time, acquiesced."⁷ *Acquiescence*, although not conferring a right on the opposite party,

¹ *Blake v. Brooklyn*, 26 Barb. 301.

² *Ib.* See chap. 24.

³ *Norwich, &c., v. Norwich, &c.*, 25 Conn. 19.

⁴ *Grey v. Ohio, &c.*, 1 Grant, 412; *Field v. Beaumont*, 3 Madd. 61; *Burden v. Stein*, 27 Ala. 104; *Long v.*

Cross, 5 Jones Eq. 323; *Whitney v. Union, &c.*, 11 Gray, 359.

⁵ Per Sir G. J. Turner, L. J. Atty. &c. *v. Sheffield, &c.*, 19 Eng. L. & Eq. 639.

⁶ Per Bigelow, J., *Tash v. Adams*, 10 Cush. 253.

⁷ Per Lord Langdale, M. R. *Mexborough v. Bower*, 7 Beav. 130.

deprives the complainant of his right to the interference of a court of equity. Unless the applicant has acted promptly, he is held to have impliedly authorized what he now objects to.¹ Thus where a party applies to stay operations upon a large and costly work, it should appear that he applied for an injunction as soon as he became apprized of his rights and the extent of the threatened injury.² So where there has been great delay on the part of a vendor, the court will not enjoin an action against the auctioneer for the deposit.³ So an injunction will not be granted to prevent back-flowage, where the party has suffered it to continue for nineteen years without objection, except a verbal notice when the dam was first built; and has seen it four times destroyed by floods and rebuilt.⁴ So one owning the water of a creek cannot enjoin a canal company from using it, after they have used it for more than twenty years, with the assent of the complainant and those under whom he claims, who were also compensated for such use.⁵ So, on a bill by a legatee against the executor, a decree was rendered for the legacy against the executor by default, three years after the service of the *subpœna* on him; whereupon the executor filed a bill to enjoin the decree, as obtained by surprise, alleging, that, at the time of the service of the *subpœna*, in the original suit, on the complaint, he was a non-resident of the State, and wrote to counsel practising in the court in which the suit was pending, to file his answer and attend to the suit; that such counsel neglected to answer, and died pending the suit; that the notifications in the case did not come to complainant's knowledge; and that he was in advance to the estate. Held, that the complainant had been guilty of laches, and was not entitled to relief.⁶ So a party cannot have an injunction against the execution of an award, if he has been injured by his own neglect to attend to his interests at the proper time.⁷ So, a bill in equity relating to a patent was filed in July. In the preceding November, the plaintiff had in writing complained of the infringement, and

¹ Binney's Case, 2 Bland, 99.

² *Ib.*

³ Lloyd v. Collett, 4 Bro. Ch. 346, 469.

⁴ Sheldon v. Rockwell, 9 Wis. 166.

⁵ Heilman v. Union, &c., 37 Penn. 100.

⁶ Callaway v. Alexander, 8 Leigh, 114.

⁷ Dulin v. Caldwell, 28 Geo. 117.

he had notice of the defendant's proceedings in the preceding August. Held, on the ground of delay, a motion for an interlocutory injunction should be refused.¹ So, in Texas, an unexcused delay of six months after judgment, in suing out an injunction, bars the right.² And on application made therefor by a surety, the fact, that the judgment was entered against his principal on an agreement for six months' stay of execution, and after the defendant's answers had been withdrawn, so that the surety could not obtain a reversal of the judgment, will not excuse the delay.³ So, in Massachusetts, an injunction will not be granted under St. 1847, c. 37, to restrain the payment of money illegally voted by a town, if the petitioners have been guilty of gross laches, and knowingly have permitted others to incur liabilities in good faith, relying upon such appropriation for reimbursement.⁴ Nor where the plaintiffs stood by while the defendants were constructing the works upon a stream, which caused the injury complained of, and suffered the use of them for five years without objection.⁵ So, after the court has once exercised the discretion conferred by (Min.) Rev. Sts. c. 70, as to relieving a party from a judgment, he must show good reason for the delay, if he suffers the time to expire before again moving in the matter by an application for an injunction.⁶ And the delay which precludes relief may apply to the right sought to be enforced, rather than the remedy. Thus where the plaintiff, who claimed under a preëemption right, prayed that he might be quieted in his title, and that the issue of a patent to the defendants might be enjoined; and more than three years had elapsed since his settlement, and the date of the preëemption act, and before the trial, though not before the suit was instituted: held, in order to entitle the plaintiff to relief, he ought to have shown that, within the three years prescribed by the statute, he had "covered the land with a valid certificate."⁷ So it is only when the plaintiff in equity has exercised due precaution to prevent an injury, that he can be relieved by

¹ *Bovill v. Crate*, Law Rep. (Eng.) Eq. March, 1866, p. 387.

² (Hart. Dig. art. 1599.) *Pillow v. Thompson*, 20 Tex. 206.

³ *Ib.*

⁴ *Tash v. Adams*, 10 Cush. 252.

⁵ *Wood v. Sutcliffe*, 2 Sim. N. S.

168.

⁶ *Myrick v. Edmundson*, 2 Min. 259.

⁷ *Walters v. Wells*, 8 Tex. 202.

an injunction.¹ Neglect to examine a sheriff's return is great negligence.²

§ 44. But it is held that mere delay will be no ground for refusing an injunction where the complainant's right is clear ;³ and that delay, if inadvertent, will not be ground for dissolution of an injunction.⁴ And equity will not bar the claim of a bank against an indorser, because no action was brought for eleven years, and because of the loss of security of prior parties to the bill, if it appear that the indorser has used no diligence to protect himself against such loss of security.⁵ (a)

§ 45. To warrant an injunction, strong *prima facie* evidence of the facts on which the complainant's equity rests must be presented to the court. The mere oath of the party as to the existence of a debt, of which he holds or is presumed to hold the written evidence, without producing it, should not be regarded as any proof of such debt. The instrument should be exhibited with the bill, or a satisfactory reason assigned for its non-production.⁶ So in all cases of waste and nuisance it must appear clearly that the party has per-

¹ Russ v. Wilson, 22 Maine, 207.

⁵ Malone v. Central Bank, 17 Geo.

² Myrick v. Edmundson, 2 Min. 259. 111.

³ Burden v. Stein, 27 Ala. 104.

⁶ Union, &c. v. Poultney, 8 Gill & J.

⁴ Schermerhorn v. L'Espinasse, 2 Dall. 360.

(a) The embarrassment to which a party may be subjected, in regard to the time of applying for an injunction, is pointedly expressed by Sir J. Romilly, M. R., in a very late case. "If he comes to the court and complains very early, then the evidence is that 'it is not perceptible' — 'it is wholly inappreciable' — and you get evidence after evidence for the defendants (the pollution being slight, and perhaps only observable at some times and on some occasions), saying 'you have no proof at all that there is any appreciable pollution, and you must wait until it becomes a nuisance.' Then he waits for five or six years until it is obvious to everybody's sense that the pollution is considerable, and then they say, 'you have come too late, you have allowed this to go on for twenty years, and we have acquired an easement over your property and a right of pouring the sewage into it.' My opinion is, that any person who has a watercourse flowing through his land, and sewage which is perceptible is brought into that watercourse, has a right to come here to stop it ; and that when the pollution is increasing, and gradually increasing, from time to time, by the additional quantity of sewage poured into it, the persons who allow the polluted matter to flow into the stream are not at liberty to claim any right or prescription against him." Goldsmid v. Commrs, Law Rep. (Eng.) Eq. February, 1866, p. 167.

sonal knowledge of the material facts charged, or he must produce supplemental proof.¹ So where the evidence introduced consists merely of the opinions of witnesses, a perpetual injunction is not to be decreed, unless the case is made out to the satisfaction of the court.²

§ 46. On a bill filed in one State, to enjoin a citizen thereof from prosecuting proceedings in another, an exhibit of the proceedings should be filed.³

§ 47. An injunction which depends on an indebtedness evidenced in writing will not be granted, unless such written evidence be submitted with the bill, or satisfactory reason for its non-production be given.⁴ (See § 55.)

§ 48. On a motion for an injunction — as upon a petition to enjoin a sale — the answer should be sworn to ;⁵ and the denials made in the answer on personal knowledge, direct and responsive to the bill, are to receive the consideration due to them as if on the hearing ; but matters set up by way of avoidance are to be received as affidavits.⁶

§ 49. On the hearing of an application for an injunction, where notice is given, *affidavits* taken *ex parte* and without notice may be read.⁷ (a) So, on a bill for an injunction, affidavits may be read on both sides, after answer made, if they do not refer to title.⁸ So on a motion for an injunction the

¹ Perkins v. Collins, 2 Green, Ch. 482.

² Woodruff v. Lockerby, 8 Wis. 369.

³ Buchanan v. Torrance, 11 Gill & J. 342.

⁴ Nusbaum v. Stein, 12 Md. 315.

⁵ Dearborn v. Phillips, 21 Tex. 449.

⁶ United States v. Parrott, 1 McAll. C. C. (Cal.) 271.

⁷ Hardenburg v. Farmers', &c., 2 Green Ch. 68. See 10 Sim. 50 ; Jackson v. Cassidy, 10 Sim. 326 ; Taylor v. Leigh, 2 Jac. & W. 387.

⁸ Brooks v. Bicknell, 3 McLean, 250.

(a) As in case of waste, in support of a motion for injunction on an *interpleading* bill, affidavits of the facts are admissible. Langston v. Boylston, 2 Ves. Jr. 101.

In New York application for injunction must be made by affidavit ; but the applicant may annex his complaint to an affidavit, which shall refer thereto, and amount to an oath that the allegations are true ; and the whole together may answer the double purpose of a verified complaint, and of an affidavit. Fowler v. Burns, 7 Bosw. 637.

affidavit of the defendant is competent evidence against the oath of the plaintiffs.¹ But an action for injunction will not be refused, upon the ground of a denial of the equity of the bill by the defendant's mere affidavit, without answer, where the bill is corroborated by an additional affidavit of very material facts, which the defendant does not deny.²

§ 50. Where an injunction will affect persons who have no opportunity to be heard, as an injunction to prevent the election of officers of a corporation, the plaintiff must, in addition to the allegation of his own information and belief, if he has no personal knowledge of the facts, annex the affidavit of a person who knows the facts, and from whom the information was derived.³

§ 51. It is held that the complainant cannot, on an application for an injunction against waste, read affidavits, on bill and answer, in support of his title.⁴

§ 52. In general, an injunction will not be granted upon mere information or belief; but if the particular allegations relied upon are stated positively in the complaint, and not on information and belief, a verification in the usual form is sufficient. A separate affidavit is unnecessary, if the cause for an injunction exists at the commencement of the suit.⁵ (a)

§ 53. In ordinary cases, an injunction may be granted upon the bill alone, supported by affidavit, before the *subpoena* has been served.⁶

§ 54. It is held unnecessary that an affidavit for an injunc-

¹ *Baker v. Taylor*, 2 Blatch. 82.

⁴ *U. S. v. Parrott*, McAll. C. C.

² *Walton v. Crowley*, 3 Blatch. 440. (Cal.) 271.

³ *Walker v. Devereaux*, 4 Paige, 229; *Southern, &c. v. Hixon*, 5 Ind. 165.

⁵ *Woodruff v. Fisher*, 17 Barb. 224.

⁶ *Jones v. Magill*, 1 Bland, 177.

(a) A party's affidavit, which recites that "the facts and allegations set forth in the petition for an injunction are true," and that the facts, stated to be on his belief, he believes to be correct, is sufficient. *Livingston v. Dick*, 1 La. An. 323.

So an affidavit, that "the facts and allegations as set forth in the foregoing petition are true, as therein alleged, to the best of his (affiant's) knowledge and belief." *Knox v. Coroner*, 13 La. An. 88.

tion, made by an agent, should set forth the absence of the principal ; it is sufficient to prove, on the trial, that he was absent when the affidavit was made.¹

§ 55. The purpose of an affidavit is to obtain the confidence of the court, and this may be obtained by documentary evidence as well as by affidavit ; as, for example, by an authenticated copy of the will under which the complainants claim their emancipation from slavery.² (See § 47.)

§ 56. Though a bill not sworn to does not entitle a party to an injunction in the first instance, yet if, at the close of the hearing, he shows himself entitled to it, it may then be granted.³ So a petition or answer in a bill for an injunction, as a portion of the final relief, is not, for the want of an oath, to be regarded as a nullity, but is to be esteemed as sufficient for the purpose of admitting proof on the final hearing.⁴

§ 57. It is said, that, where an execution is sought to be enjoined, there is good reason why a petition should be under oath, as the defendant has rights which should not be disturbed, unless on real and substantial grounds. The reason why the answer should be under oath is not so manifest.⁵ So, where the plaintiff, by bill sworn to, applies for an injunction to restrain the defendant from removing certain property, in which he claims an interest, and the defendant makes an insufficient answer, the court will allow the bill of the plaintiff to be read as an affidavit, and if, on the whole case the matter is left in doubt, the injunction will be continued until the hearing.⁶

§ 58. An injunction to prevent the setting up of a fraudulent deed, embracing the whole estate of an old man, past the age of active labor, is a special one, and the bill of the plaintiff may be read as an affidavit in reply to the defendant's answer.⁷

¹ *Wilson v. Curtis*, 13 La. An. 601.

² *Negro, &c. v. Sheriff*, 12 Md. 274.

³ *Hawkins v. Hunt*, 14 Ill. 42.

⁴ *Eccles v. Daniels*, 16 Tex. 136.

⁵ *Ib.*

⁶ *Wilson v. Mace*, 2 Jones Eq. 5.

⁷ *Peterson v. Matthis*, 3 Jones Eq. 31.

§ 59. Where an affidavit was filed, and intitled in a cause in which there were three defendants, and the name of one was afterwards struck out, and an injunction granted on the affidavit as originally made; held, the injunction should stand. In answer to the argument of counsel, the Vice-Chancellor said, that the perjury, if any, was committed at the moment when the affidavit was filed.¹

§ 60. The question is, of course, a very important one, what courts have jurisdiction to enjoin the proceedings of other courts, and on the other hand the proceedings of what tribunals are liable to be thus summarily interrupted. In this country, the subject is involved in peculiar complication, by reason of the concurrent authority of the United States and State courts, and the conflict liable to arise among the courts of different States.² (a) (See § 80.)

¹ Hawes v. Bamford, 9 Sim. 653.

² See Martin v. O'Brien, 34 Miss. 21.

(a) In New York, an application by a party or privy to a suit in the Court of Chancery, to stay such suit, must be directly to the court, in the matter of the suit, not to an officer out of court. Ellsworth v. Cook, 8 Paige, 643. But, in Mississippi, where the case was such that an order would have been granted, and the objection was not taken on the argument, the injunction was allowed to stand for such order. Mason v. Payne, Walk. Ch. 459. On the other hand, judges, or any one of them, of the Court of Appeals of Virginia, out of court, but not the court itself, are authorized to grant an injunction, which has been refused by the judge of the Superior Court of Chancery. Mayo v. Haines, 2 Munf. 423. It has been held that one judge of the Supreme Court of Pennsylvania has not power to grant an injunction in any case; it can only be done by the court when sitting in *banc*. Riley v. Ellmaker, 6 Whart. 545. But, in a recent case, motion being made in Philadelphia that the court order a motion for a preliminary injunction to be argued before the court in *banc*, it was held, that such motions belong properly to the judge at *nisi prius*, and the court will consent to hear them only when he regards them of such importance as to request it to sit with him for that purpose. Philadelphia, &c. v. Railway Co., 33 Penn. St. 82. Where a petition for leave to file a bill of review, under the act of 1795, c. 88, also praying an injunction, has been dismissed by the Court of Chancery, in Maryland, the Court of Appeals cannot grant the injunction, although the court below ought to have done so. Lockett v. White, 10 Gill & J. 480. In 1837, the legislature of Maryland passed an act for laying out certain streets in Baltimore. If streets should be extended, certain owners of land should, in a certain court, be entitled to damages for one half the bed of the street laid out in front of their land. In 1847, one of the streets was extended. The owners filed their bill, alleging that the damages, secured to them by the act, had not been assessed to them, and praying an injunction against collection of certain sums assessed on them as benefits, and for general relief. An injunction was granted. The answer of

§ 60 a. Some early cases best illustrate the nature of the remedy by injunction, as involving the authority of different courts.

the mayor, &c., averred, that the provisions of the act were specially brought to the attention of the jury, and deliberately considered by them; and, thereupon, the chancellor dissolved the injunction, on the ground that a court of equity has no authority to stay the proceedings on the judgment of the Baltimore City Court. *Richardson v. Baltimore*, 8 Gill, 433. The several Superior courts of Chancery, in Virginia, have jurisdiction to grant injunctions upon judgments at law rendered within their respective districts only. The place of the rendition of the judgment, and not the residence of the parties, determines the jurisdiction. *Cocke v. Pellok*, 1 H. & M. 499. In Texas, the judgment of a justice of the peace in a case in which he had no jurisdiction is a nullity, and may be perpetually enjoined; and it is immaterial in such case whether the application for injunction is within ninety days or not. *McFaddin v. Spencer*, 18 Tex. 440. Where judgment has been rendered in the District Court upon a cause of action within the probate jurisdiction of the County Court, the defendant should appeal; but, if he does not, he can have execution enjoined, for want of jurisdiction. *Cunningham v. Taylor*, 20 Tex. 126. One district judge may enjoin the execution of process issued from another district into his own. *Kitchen v. Crawford*, 13 Tex. 516. The Circuit courts of Mississippi have not jurisdiction to grant injunctions originating, and to operate, beyond their respective districts. *Montgomery v. Commercial*, 1 S. & M. Ch. 632. In Tennessee, an injunction bill is a personal action, within the meaning of the statute requiring such actions to be brought in the county where the defendant resides. *Childress v. Perkins, Cooke*, 97. A bill to enjoin a judgment at law may be brought in the county where the judgment was recovered, although the defendant may be found and served with process in another county. *Newman v. Stuart, Cooke*, 339. Where a court has jurisdiction only in case the amount in dispute exceeds \$50, it has no jurisdiction to enjoin a judgment on account of an excess of \$12 therein. *Rentfroe v. Dickinson*, 1 Overton, 196. If courts of law and equity have concurrent jurisdiction, a failure to make the defence at law, if the defendant answer to the merits, will not oust the jurisdiction of chancery; but if the defence set up was purely legal, and in its nature unfit for equity jurisdiction, the defendant may insist upon the want of jurisdiction at the hearing, though he may not have demurred. *Rice v. Railroad, &c.*, 7 Humph. 39. In Georgia, a court in one county may enjoin an action pending in that county, though the plaintiff in such action resides in another; although it cannot further grant relief. *Key v. Rabison*, 29 Geo. 34. An injunction will not lie against the justices of the inferior court, and the only remedy, by which a contract can be enforced against them, is *mandamus*. *The Justices v. Croft*, 18 Geo. 473. In California, one court cannot interfere in proceedings before another of concurrent jurisdiction. All proceedings to enjoin judgments must issue from the court having the control of such judgments. The rule is the same (§ 78) in an equity suit, when a bill is brought, and other parties joined, not concluded in the action at law sought to be enjoined. The only case in which it will be allowed, is where the court, in which the action or proceeding is pending, is unable by reason of its jurisdiction to afford the relief sought. Where several fraudulent judgments are confessed in several courts, it would not be necessary for a creditor to sue in each. So where the provisions of the court require the action to be tried in a particular county, there would be

§ 60 b. The defendant had obtained judgment in ejectment against the now plaintiff, and had execution awarded, but the under-sheriff refused to execute it; whereupon, by rule of Court of the King's Bench, the under-sheriff was ordered to attend, and for not attending an attachment was awarded against him. After all this proceeding, the defendant in the ejectment exhibits his bill in this court, and Emerton praying a *dedimus*, an injunction was granted of course. I moved my lord, that this injunction might not extend to stay proceedings against the under-sheriff for his contempt to the Court of King's Bench for the contempt at the king's suit; and it was unnatural for the king, by his injunction, to stay his own suit in another court, the offence being committed before the bill exhibited; yet the motion was denied by my Lord Chancellor.¹

§ 60 c. Upon a motion for an injunction to stop the sale of English Bibles, printed beyond sea, it was urged that the *Chancery* was a court of State, and therefore for the great mischief that might arise from these Bibles, if they should be suffered to be publicly sold, the sale ought to be prohibited by this court upon that politic account, as well as to quiet the king's patentees in their possession. Lord Keeper: I do not apprehend the *Chancery* to be in the least a court of State; neither can I grant an injunction in any case, but when a man has a plain right to be quieted in it; and, though the patent for law-books has been adjudged good in the *House of Lords*,

¹ ——— v. Emerton, 1 Vern. 25.

an exception. *Anthony v. Dunlap*, 8 Cal. 26; *Rickett v. Johnson*, ib. 34; *Revalk v. Kraemer*, ib. 66; *Chipman v. Hibbard*, ib. 268; *Phelan v. Smith*, ib. 520; *Gorham v. Toomey*, 9 Cal. 77; *Uhlfelder v. Levy*, ib. 607. A county judge may grant an injunction in a district court case. *Ruthrauff v. Kresz*, 13 Cal. 639. In Minnesota, in case of injunction at chambers by a judge of the District Court, *ex parte*, there is no appeal. *Hoffman v. Mann*, 11 Min. 364. In Illinois, a circuit judge may grant injunctions to operate through the State. *Welch v. People*, 38 Ill. 20. One circuit judge may grant an injunction, after the refusal of another to do it. And the latter cannot vacate it, in vacation and of his own mere motion. This must be done in term time by a motion to dissolve. *Welch v. People*, 38 Ill. 20. Where the judge of one circuit awards an injunction, which is to operate and must be issued in another, the clerk can be compelled to issue it only by commitment for contempt in case of refusal. A *mandamus* could issue only from the court of the latter county or the Supreme Court. *Welch v. People*, 38 Ill. 20.

yet that is not exactly the same case with this, though near it. Let there be a trial at law, and let the king's patentees be plaintiffs, and the defendants admit they have sold *twelve* Bibles, and when the trial is over come back again.¹

§ 61. It was early held, that a court or a judge of a court of the United States cannot enjoin proceedings in a State court.² Hence, where cases are pending in a State court, in which property had been attached before any act of bankruptcy on the part of the defendant, and he had obtained and pleaded his discharge; the assignee and all claimants of the property may be enjoined from attempting to procure process from any court not acting under the authority of the State, with a view to prevent judgments or executions in such actions; and also from applying for or attempting to execute any summary process, order, or decree of any court with the view of taking from the creditors or their attorneys the fruits of their judgments, on account of any supposed want of right to render such judgments or their supposed invalidity, while in force and unreversed. Also from making application or instituting proceedings, founded on any supposed breach of an injunction or order, issued by any tribunal not acting under State authority, by reason of any proceedings in the State courts, arising after the discharge was pleaded.³ (a) So a bill for injunction cannot be maintained in the court of the United States by a non-resident, unless the same remedy would lie in a State court, in behalf of a resident.⁴ But a circuit court may grant an injunction to a judgment at law, although a writ of error to the judgment is pending in the Supreme Court.⁵ And the fifth section of the Act of March 2, 1793 (1 Sts. at Large, 334), which forbids the United States Court to grant an injunction to stay

¹ 1 Vern. 120.

⁴ Ewing v. St. Louis, 5 Wall., Law

² Diggs v. Wolcott, 4 Cranch, 179; Reg. December, 1867, p. 121.

Rogers v. Cincinnati, 5 McLean, 337.

⁵ Parker v. The Judges, 12 Wheat.

³ Kittredge v. Emerson, 15 N. H. 227. 561.

(a) This is one of the series of cases, involving a conflict of jurisdiction between the Circuit Court of the United States and the Supreme Court of New Hampshire, with reference to proceedings under the late bankrupt law. The State jurisdiction was finally vindicated by a judgment of the Supreme Court of the United States. See Peck v. Jenness, 7 How. 612; Hilliard on Bankruptcy, &c. 123.

proceedings in a State court, does not restrain it from enjoining a sheriff from levying on the property of A on a process against B.¹ So a bill in equity lies in the United States Court, to enjoin an action at law brought by an alien, and though the court has no jurisdiction for other relief.²

§ 62. It was recently held, that, where a mortgage given to a citizen of another State, as security for bonds, is sued for foreclosure in a State court, and the defence is set up of partial failure of consideration ; the State court may issue an injunction against a subsequent suit upon the bonds in the United States Court, where such defence could not be made.³ But, in general, a State court of chancery will not, by injunction, restrain a suit or proceeding previously commenced in a court of another State, or in any of the Federal courts.⁴ In a late case, being a bill to enjoin a judgment recovered in the United States Court for infringement of a patent, it is said: "We have not the power, if we had the inclination, to enjoin proceedings in the courts of the United States ; and should hardly think of commencing so novel an enterprise in a case for the infringement of a patent, which is expressly, if not exclusively, confided by law to those courts. The suggestion in the bill, that when this case was tried in the Circuit Court of the United States for this district, parties were not allowed, as now in our State courts, to be called, or to offer themselves as witnesses, affords not the slightest ground for our interference."⁵

§ 63. Application is sometimes made to enjoin proceedings in chancery.

§ 64. It is held that an injunction to restrain the execution of a decree in equity cannot be granted.⁶ In *Jackson v. Leaf*,⁷ Lord Eldon remarked: "I do not remember any instance where this court has enjoined a party from proceeding in an-

¹ *Cropper v. Coburn*, 2 Curt. 465.

² *St. Luke's, &c. v. Barclay*, 3 Blatch. 259.

³ *Akerly v. Vilas*, 15 Wis. 401.

⁴ *Mead v. Merritt*, 2 Paige, 402 ; *Schuyler v. Pelissier*, 3 Edw. Ch. 191 ;

English v. Miller, 2 Rich. Eq. 320. See *Boyd v. Hawkings*, 2 Dev. Ch. 329.

⁵ Per Ames, C. J., *Kendall v. Winsor*, 6 R. I. 462.

⁶ *Greenlee v. McDowell*, 4 Ired. Eq. 481.

⁷ 1 Jac. & W. 232.

other court of equity. In the same court of equity you do restrain them, when there are different suits for the same purpose." But a court of equity may withdraw its own process, in a proper case, or stay execution by *supersedeas*.¹ (a)

§ 65. Where it was competent for the officer allowing an injunction to allow it either as injunction master or judge of the Court of Chancery, and where it does not appear clearly in which capacity he did act, it will be presumed that he acted as judge of the court.²

§ 66. It is held in New York, that, where an injunction has been granted by a judge at chambers, a motion for its dissolution may be made directly to the court, without having first applied to the judge who granted it.³ But, in a recent case, section 324 of the Code is held to apply to injunction orders. Hence a judge of the Supreme or County Court may, on application *ex parte*, vacate or modify an injunction order made by him without notice. The power, however, should not be exercised, except to prevent serious loss by delay. And where the application had been delayed for a year, and all the defendants but one had appeared and answered; such an order was held to have issued improvidently.⁴

§ 67. In a case where a bottomry bond had been given for an amount grossly exceeding the value of the ship, an injunction was granted to restrain an *admiralty* suit upon such bond, nothing having been done towards determining the rights of the parties in the Admiralty Court before the filing of the bill, though money had been paid into court and bail given. The ground of decision was, that the matters could be more conveniently, directly, and effectually determined in equity than in admiralty.⁵

¹ 4 Ired. Eq. 481.

² Frost v. Myrick, 1 Barb. 362.

³ Woodruff v. Fisher, 17 Barb. 224.

⁴ Peck v. Yorks, 41 Barb. 547.

⁵ Duncan v. McCalmont, 3 Beav. 409. See Castelli v. Cook, 7 Hare, (27 Eng. Cha.) 89.

(a) The Supreme Court of Ohio cannot by injunction restrain a suit in chancery in the Court of Common Pleas, and take jurisdiction of the same subject matter, of which the courts have concurrent jurisdiction. Merrill v. Lake, 16 Ohio, 373. In Indiana, the Court of Common Pleas cannot enjoin the execution of process from the Circuit Court. Indiana, &c. v. Williams, 22 Ind. 198.

§ 67 a. In Ohio, it has been held that the power to grant an injunction, in a case pending in the Court of Common Pleas, cannot constitutionally be conferred upon the Supreme Court. The court remark, "that we can allow an injunction in a case pending in this court upon an appeal is very clear. An injunction may be the very object of the suit—the final decree sought—and so a provisional injunction, during the pendency of the suit, may be necessary for the purposes of justice. The power to allow these, is a part of the appellate jurisdiction, the grant of which is authorized by the Constitution, and has been made by the law. But to allow an injunction in a case pending in another court, would be an exercise of original, and not of appellate jurisdiction. Now the original jurisdiction conferred upon this court by the Constitution, is limited to *quo warranto*, *mandamus*, *habeas corpus*, and *procedendo*. Art. 4, sect. 2. It would be wholly inconsistent with, and in a great measure destructive of the judicial system it ordains, to suppose that this original jurisdiction can be enlarged by law. It is true, there is no express prohibition against it, but none was necessary." ¹

§ 68. We shall have occasion in another connection to consider the question, whether and how far *foreign* proceedings may be restrained by injunction. (a) (See Chap. VI., *Suits*.) It may be here remarked, that, if the circumstances of a case

¹ Per Thurman, J., *Kent v. Mahaffy*, 2 Ohio St. 498.

(a) In North Carolina, the court will not drive a party to seek redress in the courts of another State, when a less circuitous and better remedy can be given in the courts of North Carolina at less cost. *Richardson v. Williams*, 3 Jones Eq. 116. A bill was filed by the plaintiffs, owners of a charter, from the State of South Carolina, of the Augusta Bridge over the Savannah River, which divides South Carolina from Georgia, against the City Council of Augusta, in Georgia, owners of a charter of the same bridge from the State of Georgia, for an account of tolls collected by the defendants, and for an injunction to restrain them from collecting more than one moiety of tolls, and also from collecting any tolls whatever at a new bridge which they had built in violation of the plaintiffs' charter. It was averred in the bill, that of so much of the Augusta Bridge as lay within the territorial limits of South Carolina, the plaintiffs were the owners, and it was incidentally stated that the defendants owned some lots in Hamburg, in South Carolina. A plea to the jurisdiction, because the defendants were non-residents of South Carolina, was sustained. *McKinne v. Augusta*, 5 Rich. Eq. 55.

are such as would make it the duty of one court in England to restrain a party from instituting proceedings in another court in England, they will also warrant it in imposing on him a similar restraint with regard to proceedings in a foreign court. The fact of a foreigner having property in England enables the court to make effectual an injunction issued to him; but, especially in the case of a foreigner who seeks no assistance from the English courts, the issuing of such injunction ought clearly to be shown to be required as conducive to justice.¹ So equity may entertain a bill respecting land, though the land is not within its jurisdiction, where its decree can be enforced by acting on the person of a party; and, in a proper case, the court will restrain the party from leaving the jurisdiction by a *ne exeat*.²

§ 69. With reference to the *pleadings* in application for injunction, (a) an injunction will not ordinarily be granted under a prayer for general relief, but must be expressly prayed.³ As in case of a bill for discovery.⁴

§ 69 a. Late cases illustrate the general proposition, that a party applying for injunction will be strictly held to the precise grounds upon which, by the terms of his bill, he claims this extraordinary relief. Where part-owners of a ship apply for an injunction as charterers, though stating themselves to be managing owners, they can have relief only in the former, not the latter capacity.⁵

¹ Carron, &c. v. Maclaren, 35 Eng. Law & Eq. 37.

⁴ Primmer v. Satten, 32 Ill. 528.

² Enos v. Hunter, 4 Gilm. 211.

⁵ Lidgett v. Williams, 4 Hare, (30 Eng. Cha.) 464.

³ Lefforge v. West, 2 Cart. 514. See Long v. Cross, 5 Jones, Eq. 323.

(a) In New York, "the Code, sect. 69, has expressly abolished the distinction between actions at law and suits in equity, and the forms of all such actions; and it declares that there shall be but one form of action for the enforcement or protection of private rights and the redress of private wrongs." Per Allen, P. J., Mallory v. Norton, 21 Barb. 436. In the same State, where a preliminary injunction is asked upon facts not alleged to be within the knowledge of the defendant, the bill must be sworn to positively, either by the plaintiff or by some person from whom information of the facts was derived. Paterson v. Bangs, 9 Paige, 627. As to the general subject of pleading in equity, see Hogan v. Ashton, Leg. Intel. (Pa.) January 24, 1868.

§ 69 b. A common injunction cannot be sustained on grounds stated in the answer, but not in the bill. If the plaintiff chooses to select a set of circumstances as constituting his case, and the defendant, on his answer, represents that the facts of the case were totally different, and they are such as he represents on his answer, the court will not allow the plaintiff, in opposition to his own case on the bill, to speculate on the facts which are stated in the defendant's answer, and say that out of them an equity arises which he has not thought proper in the first instance to adopt.¹ (a)

§ 70. A complaint for an injunction need not disclose whether a bond is filed or not.²

§ 71. An injunction can only be granted when it appears by the complaint that the plaintiff is entitled to the relief demanded.³

§ 72. Where a bill is bad upon demurrer, an injunction should not be granted, even if the defect is in point of form merely.⁴ But where an action was commenced by the service of summons, without complaint, and the motion for an injunc-

¹ *Cresy v. Beavan*, 13 Sim. (36 Eng. Ch.) 99.

² *Smith v. Chandler*, 13 Ind. 513.

³ *Morgan v. Quackenbush*, 22 Barb. 76.

⁴ *Rose v. Rose*, 11 Paige, 166.

(a) Elsewhere the court say: "It is not the view with which the bill was framed. The bill seeks relief against Cook, on the ground of misconduct, and the relief prayed against him is not relief confined to this point, that, as a partial shareholder, he can have no right to take away the ship without giving security; but the relief is founded on the allegation that Cook is a large debtor to the plaintiffs, and that, until he has rendered an account, he ought not to be allowed to go out of the jurisdiction and take the ship with him. That is the case put forward by the bill. Lord Cottenham, in *Whitworth v. Gangain*, (Cr. & Ph. 325), said, that when a party comes on motion to restrain another from doing an act, he is bound to tell the court what the case is on which he relies; and that, when he brings forward prominently, and relies upon a given case, the court will not allow him, if he should fail in that case, to spell out another, and say he might have framed his case so as to show a title to the relief asked. That was a much more favorable case than this for permitting such a change of ground, for there everything which the plaintiffs asked might have been granted them on the facts as they were stated on the bill. Here, the plaintiffs are asking against Cook exclusively, relief to which, as against him alone, they are not entitled on the frame of the bill." Per V. Chancellor, *Castelli v. Cook*, 7 Hare, (27 Eng. Cha.) 98.

tion founded upon an affidavit, which although commencing in form as a deposition, contained all the requisites of a complaint as prescribed by the (New York) Code; it was held, that the form of the paper furnished no sufficient ground of objection.¹

§ 73. Great strictness will be required, in proceedings for an injunction and the appointment of a receiver of a debtor's effects, under the Ohio act of February 25, 1848, amendatory of the act directing the mode of proceeding in chancery, especially in setting forth the matters required in the second section; and, if a bill be defective in this particular, it may be dismissed at any stage of the cause, unless particular circumstances take the case out of the general rule.²

§ 74. The mere allegation in a complaint, that the legal remedy is too tardy, or that irreparable mischief will ensue, is not sufficient; but the facts must be stated, to show that the apprehension of injury is well founded.³

§ 75. Allegations in a bill, that "a firm, or some of the members of said firm," had done certain acts, that "some of the firm had obtained control of certain executions by purchase, or otherwise," that said firm bought "the same either for R. or after his death," and that they had not done certain acts as "to some of these executions;" are too inaccurate, loose, and uncertain.⁴

§ 76. The complainant must disclose all the facts of his case, or it will be presumed that those not disclosed would make against him if known.⁵ Thus the averments in a petition, which seeks to enjoin the execution of a judgment on mere technical grounds, and without disclosing merits, must be taken most strongly against the complainant. So where one of two defendants, the other being dead, sought to enjoin,

¹ *Morgan v. Quackenbush*, 22 Barb.

76.

² *Gury v. Tannenwald*, 18 Ohio, 481.

³ *Catching v. Terrell*, 10 Geo. 576;

De Witt v. Hays, 2 Cal. 463.

⁴ *Green v. Ingram*, 16 Geo. 164.

⁵ *Sauvinet v. New Orleans*, 1 La.

An. 346.

on technical grounds, an order of sale, and did not allege that the property, or any part of it, belonged to the petitioner; the court held that the injunction was properly dissolved.¹ So a bill for injunction of a sale, under a mortgage or deed of trust, must specially set forth the grounds, not merely that the plaintiff does not owe the note.² So where the complainant relies upon his own oath, the charges in the bill, and the affidavit to verify them, should be direct and positive, and not such as can only be made sufficient by the aid of presumption.³

§ 77. If an injunction is prayed in the bill, but omitted in the prayer for process, an injunction ought not to issue without an amendment.⁴

§ 78. The rule that, in injunction bills, the particular title of the complainant must be set forth, is more especially applicable in cases of waste; in cases of trespass and nuisance, it is sufficient to allege that the complainant is the owner in fee simple, and in possession.⁵ And, in a late case, where in a bill for injunction the complainant alleged that he was "seized and possessed" of the land in question, but there was no demurrer or objection to evidence, but a special answer, putting in issue the question of ownership; held, even if the above words imported nothing more than possession, objection could not be taken by a motion in error.⁶

§ 79. An injunction bill will not be dismissed because the master has omitted to sign the *jurat*, if the bill has been actually sworn to.⁷

§ 80. An injunction of a sale of land, under a power in a mortgage, may be granted on a bill, which does not contain a sufficient description of the land to justify a writ of possession.⁸

¹ Gothard v. Reiley, 14 Tex. 461.

² Foster v. Reynolds, 38 Mis. 553.

³ Perkins v. Collins, 2 Green, Ch. 482.

⁴ Bailey v. Stiles, 2 Green, Ch. 245.

⁵ Van Winkle v. Curtis, 2 Green, Ch. 422.

⁶ Falls, &c. v. Tibbetts, 31 Conn. 166.

⁷ Capner v. Flemington M. Co., 2 Green, Ch. 467.

⁸ Conant v. Warren, 6 Gray, 562.

§ 81. A bill for injunction need not contain a prayer for discovery.¹ But, on the other hand, there can be no injunction upon a bill of discovery which does not pray for an injunction.²

§ 82. An allegation of the *service* of an injunction means a service that is legal and sufficient in law.³

§ 83. On an *ex parte* application for an injunction upon bill alone, the injunction will not be refused for an apparent *misnomer* of the defendant, as he may not, on coming in, wish to avail himself of the objection.⁴

§ 84. A defendant cannot, after consenting to a decree against him, for an injunction and an account, object to the misjoinder of one of the plaintiffs.⁵

§ 85. Where a surety alleged, in his bill for relief against a judgment, that the creditor indulged the principal without the complainant's consent, and the respondent answered that such consent was given : held, the negative averment of the complainant was proper, but one which he was not bound to prove ; that the denial of the defendant did not make his answer evidence ; and that it was incumbent on him to prove such consent.⁶

§ 86. Where a bill asks for an injunction, to protect the complainants from apprehended danger, and the answer denies that the apprehensions are well grounded ; the court will give the defendants the full benefit of their denial, and refuse the injunction, unless the complainants make out a very clear case in their bill and affidavits.⁷

§ 86 a. With reference to the pleadings subsequent to the bill, it is held that an injunction will not be granted before

¹ *Laurence v. Bowman*, 1 McAll. C. C. (Cal.) 419.

² *Primmer v. Patten*, 32 Ill. 528.

³ *Loomis v. Brown*, 16 Barb. 325.

⁴ *Bosley v. Susquehanna, &c.*, 3 Bland, 63.

⁵ *Livingston v. Woodworth*, 15 How. 546.

⁶ *Carpenter v. Devon*, 6 Ala. 718.

⁷ *Rogers v. Danforth*, 1 Stockt. 289

answer, unless some interest of the plaintiff will be injured or endangered by the proceedings of the defendant in the mean time.¹ And, on a motion for a provisional injunction, the defendant may file and read his answer to the bill.²

§ 86 b. The (Maryland) acts of 1852, c. 133, and 1853, c. 344, do not apply to an answer, at the hearing of a motion for the dissolution of the injunction, when such a hearing is not a final one.³

§ 86 c. A defendant may by a sufficient answer to the bill at once prevent an injunction;⁴ as by an answer which would dissolve an injunction if granted.⁵ But where the bill alleges fraud, forgery, and antedating, and the answer denies these allegations only on "information and belief," it is not sufficient to prevent the issue of an injunction.⁶ And in the Circuit Court of the United States the practice is settled, that the denial of the plaintiff's title in an answer does not prevent the court from awarding a special temporary injunction.⁷

§ 87. With reference to the formal requisites of the injunction itself, it is held that an injunction should be clear and explicit, and apprise the defendant what he is restrained from doing, without the necessity of his resorting to the bill on file; and, if he does not in fact know to what the injunction applies, he will be justified in proceeding, notwithstanding the injunction.⁸ (See Chap. IV.) Thus an injunction restraining a husband from annoying his wife is improper.⁹ So an injunction must, upon its face, show clearly to what property it is intended to apply, or it cannot be enforced.¹⁰ And an injunction should be restricted to the case made by the bill.¹¹ In Pennsylvania, it is said, "injunctions are frequently in the form of a *writ*, but these forms are not adapted to every case, and

¹ Osborn v. Taylor, 5 Paige, 515.

² Hulse v. Wright, Wright, Ch. 61.

³ Bouldin v. Baltimore, 15 Md. 18; Gellston v. Rullman, 15 Md. 260.

⁴ Hall v. McPherson, 3 Bland, 529.

⁵ Bell v. Purvis, 15 Md. 22.

⁶ U. S. v. Parrott, 1 McAll. C. C. 271.

⁷ Clum v. Brewer, 2 Curt. 506; Poor v. Carleton, 3 Sumn. 70.

⁸ Sullivan v. Judah, 4 Paige, 444; 2 ib. 234.

⁹ Lowrie v. Lowrie, 2 Paige, 234.

¹⁰ Moat v. Halbein, 2 Edw. Ch. 188.

¹¹ 2 Paige, 234.

therefore the prohibition in numerous instances assumes the shape of an *order*, in the nature of an injunction. As the courts treat the disobedience of all orders as a contempt, and enforce the performance of them by imprisonment, the distinction between a *writ* of injunction and an *order* in the nature of one is disregarded in practice. Both are known by the name of injunctions. If the order be issued in mandatory language, it is substantially an injunction; if in terms of advice or caution, it is what has become known as an 'admonitory order.' ”¹ (a)

§ 88. An injunction may be granted upon a supplemental bill, though one founded upon the original bill has been dissolved upon its merits.² So a bill of injunction may be granted, after a former bill for the same cause has been dismissed for not having been served on the defendant in time; but there should be an affidavit of some particular hardship, and no omission on the part of the claimant.³ So, in Georgia, by the act of 1842, the power of issuing a second injunction, when the first bill has been dismissed, is given to the Superior Court; ⁴ and in Virginia, though an injunction be refused by

¹ Per Lewis, C. J., *Erie, &c. v. Casey*, 26 Penn. 292.

² *Mayfield v. Hawkins*, Mar. 27.

⁴ *Cox v. Mayor, &c.*, 17 Geo. 249.

³ *Van Bergen v. Demarest*, 4 John. Ch. 35.

(a) In the case of *Yates v. Jack*, Law Rep. (Eng.) Eq. April, 1866, p. 298, Lord Cranworth adopted the following rules and forms of practice with reference to the obstruction of ancient lights: "They are entitled to an injunction restraining the defendant from erecting any building so as to darken, injure, or obstruct any of the ancient lights of the plaintiffs as the same were enjoyed previously to the taking down by the defendant and of his building on the opposite side of the street, and also from permitting to remain any buildings already erected, which will cause any such obstruction. Whether the buildings already erected not exactly opposite will have that effect when the whole of the defendant's buildings are finished, is a matter on which the evidence does not enable me to come to any satisfactory conclusion, and I am therefore obliged to frame the decree in this general form, leaving it to the plaintiffs to apply by notice in case the terms of the injunction are violated. I shall, however, be willing to introduce a proviso into the order, similar to that adopted in the case of *Stokes v. City Offices Company*, 11 Jur. N. S. 560, enabling the parties to come before the chief clerk, in order to have it ascertained whether any proposed addition to the building will or will not be a violation of the injunction; and it must also be left open to the plaintiffs to show, that the buildings already erected materially interfere with the light heretofore enjoyed by them."

a judge of the Circuit Court, and also by a judge of the Supreme Court, such refusals are no objection to an injunction in the same case, granted by another judge of the latter court.¹

§ 89. But a second injunction will not be granted for the same purpose, while the first is in force; and if the first has been withdrawn by the plaintiff, after it was served, that fact should be fully stated in the bill for a second.² And on an application to reinstate an injunction, if the newly-discovered equity could have been made available on the first trial, by the use of ordinary care and attention, the application should be refused.³ So an *ex parte* injunction will not be granted on a new bill, or an amended bill, when a previous and similar injunction on the same parties was dissolved for want of equity.⁴ So a second injunction in the same cause, upon new grounds, cannot be granted, if the new grounds existed when the first bill was filed.⁵ Nor successive injunctions upon different grounds, which might have been put at issue in one proceeding.⁶ So, in New York, after an injunction has been refused by the chancellor or vice-chancellor before whom the bill was filed, the plaintiff cannot, since the revised statutes, apply to an injunction master, or vice-chancellor acting as injunction master, for an injunction upon a new bill upon substantially the same grounds.⁷

§ 90. It is the general rule, that an injunction cannot be granted against a person who is not a party to the cause.⁸ The exceptions consist of cases, either where the party enjoined is the mere solicitor, (a) or agent, or tenant of a party to the suit, having no rights involved in the controversy, or where the right has been already determined.⁹ A complain-

¹ Jaynes v. Brock, 10 Gratt. 211.

² Livingston v. Gibbons, 4 John. Ch. 571.

³ Larson v. Moore, 1 Tex. 22.

⁴ Hornor v. Leeds, 2 Stockt. 36.

⁵ United States Bank v. Schultz, 3 Ham. 61.

⁶ Fluker v. Davis, 12 La. An. 613.

⁷ Cummins v. Bennett, 8 Paige, 79.

⁸ Fellows v. Fellows, 4 John. Ch. 25; 1 McCart. 268.

⁹ Schalk v. Schmidt, 1 McCart. 268.

(a) A petition for an injunction may be verified by an attorney. Edrington v. Allsbrooks, 21 Tex. 186.

ant cannot avoid the necessity of making particular persons parties, by waiving all claim against them in his bill, where it is necessary to take an account against the defendant, and where he has a right to have such persons before the court, they being interested in the account, in order to save the necessity of a future litigation with them.¹ But an injunction, inhibiting a defendant and all other persons from selling property, until a further order of the court, prevents a valid sale of the property, on execution against the defendant, although in favor of persons not parties to the suit in chancery.²

§ 91. One owner of land over which a street is laid out cannot enjoin the completion of such street for want of notice to another.³

§ 91 a. Where a statute provided that no injunction should issue without a bond, it was held to preclude the commonwealth from this remedy. The court says: "The words are broad and general. They apply to all cases, and we cannot see upon what principle we could except a case in which the commonwealth is plaintiff. But the commonwealth can give no bond, there being no organ of the government authorized to execute it for her; and if she could give bond, she would not be suable on it. The law which forbids an injunction to be granted without bond from the party can only be obeyed, in this case, by refusing the injunction altogether."⁴

§ 91 b. Though the court will not proceed against a member that has privilege of Parliament, yet, if a Parliament man sues at law, and a bill is brought to be relieved, the court will stay proceedings at law till answer or further order.⁵

§ 92. It is the prevailing rule that, in order to obtain an injunction, a party must show a particular injury distinct from that which he suffers in common with the public.⁶ (See

¹ *Dart v. Palmer*, 1 Barb. Ch. 92.

² *West v. Belches*, 5 Munf. 187.

³ *Nichols v. Salem*, 14 Gray, 490.

⁴ *Per Black, C. J., Com. v. Franklin, &c.*, 21 Penn. 130.

⁵ 1 Vern. 329.

⁶ *Falls, &c. v. Tibbetts*, 31 Conn. 165.

Nuisance.) Thus an action, for the purpose of having the act of the board of supervisors, erecting a new town, declared null and void, and enjoining its organization, cannot be maintained by persons having no other interest than one in common with all the freeholders of the new town. The only remedy is at the instance of the State or some officer.¹ So one, holding an order on a county treasurer, has no right to an injunction disturbing the county in the disposition of its property, until he has obtained judgment, and had his execution issued and returned unsatisfied; until then, he is only a creditor at large.² So the mere fact, of an individual's encroaching upon a street by a building, does not confer upon every one owning a house upon the street a right to invoke the jurisdiction of a court of chancery to prevent the encroachment, without some special ground of equity.³

§ 93. But, on the contrary, it has been sometimes held, that a private individual may obtain an injunction to prevent a public mischief by which he is affected in common with others.⁴ And where a public right appears, in a litigation between private individuals, the court is bound to protect it, though no one asserts the right in behalf of the State. Thus, where the matter in dispute was the right to charge wharfage for a wharf exclusively claimed by both parties, and the court found that neither had the right, and that the public were entitled to the free use of the wharf; both parties were enjoined from collecting such wharfage.⁵

§ 94. Where a contract is made for the sale of land, the vendee is a necessary party to a bill for an injunction to restrain a tenant from waste.⁶

§ 95. Where relief other than simply the quieting of possession is sought, and an account is to be stated between the warrantor and the party defendant, or on a bill by his grantee for the purpose of quieting possession, the warrantor is a

¹ Doolittle v. Supervisors, &c., 18 N. Y. (4 Smith), 155.

² Montague v. Horton, 12 Wis. 599.

³ Bechtel v. Carslake, 3 Stockt. 500.

⁴ Whitfield v. Rogers, 26 Miss. 84.

⁵ The Wharf Case, 3 Bland, 361.

⁶ Kidd v. Dennison, 6 Barb. 9.

necessary party.¹ But if a warrantor bring his bill of complaint singly, asking, not for a bare injunction, but also for an account and general relief, and if no objection be taken in the early stage of the proceedings, nor any suggestion made that the interests of his grantee in possession require him to be made a party; it is not the duty of the court to delay the cause, for the reason that the grantee is not made a party.²

§ 96. Two or more persons, having separate and distinct tenements, injured or rendered uninhabitable by a common nuisance, or rendered less valuable by a private nuisance, which is a common injury to the tenants of both, may join in a suit to restrain such nuisance.³ (a)

§ 97. Where a bill was brought for an injunction by two parties, whose property was injured by the same nuisance, and one of the parties brought a suit at law on a declaration containing several counts, and recovered, and afterwards a supplemental bill was filed by both parties, setting up the verdict, and affidavits were offered in support of both bills and to determine the count on which the verdict was rendered; held, as the injunction was sought after order and notice, the hearing should be had upon such affidavits as were pertinent to the issues, but that the injunction would follow the bill; that the parties were properly joined in the supplemental bill; that the injunction should be granted on the supplemental bill on the application of the party presenting the new matter; and that it was competent to show on which count the verdict was rendered.⁴

§ 98. Any one of several complainants, in a bill for injunction, may verify its statements, in order to authorize the sanction of the chancellor.⁵

§ 99. The proper allegation in a bill, by way of excuse for

¹ *Brooks v. Fowle*, 14 N. H. 248.

⁴ *Blunt v. Hay*, 4 Sandf. Ch. 362.

² *Ib.*

⁵ *Hemphill v. Ruckersville, &c.*, 3

³ *Murray v. Hay*, 1 Barb. Ch. 59.

Kelly, 435.

(a) The court exercises a sound discretion, without adhering to an inflexible rule, in determining whether there has been a misjoinder of parties in equity.

not making the representatives of a deceased person parties to the suit, is, that the decedent died insolvent, and without leaving any assets for the payment of his debts; an allegation that he died insolvent is not sufficient.¹

§ 100. Where an injunction includes persons who were not parties to the proceeding in which it issued, the injunction is nevertheless valid as to parties to the proceeding.²

§ 101. The question of injunction often arises, in connection with some other ground of equitable jurisdiction, which constitutes the primary object of the bill.

§ 102. Upon a bill for *specific performance*, and for an injunction to protect the subject-matter of the contract, the latter will not be granted, unless the plaintiff is entitled to such performance.³

§ 103. In a suit for specific performance of a contract made by the agent of a state prison for the labor of the convicts, it seems that a preliminary injunction to restrain the agent from making any other contract for such labor will not be granted, if it would prevent the employment of the convicts pursuant to the statute.⁴

§ 104. *Notice* is an important subject in connection with injunctions.

§ 105. Equity will not decree a *perpetual* injunction, which is to operate directly upon the parties in interest, without giving them an opportunity of being heard.⁵

§ 106. In New Jersey, it has been sometimes held, that notice of an application for an injunction should be given where it can be done without risk of injury by the delay.⁶

¹ Dart v. Palmer, 1 Barb. Ch. 92.

² Tradesman's Bank v. Merritt, 1 Paige, 302.

³ Geiger v. Green, 4 Gill, 472. See Raphael v. Thames, &c., Law Rep. (Eng.) Eq. March, 1867, p. 147.

⁴ Jones v. Lynde, 7 Paige, 301.

⁵ Marshall v. Beverley, 5 Wheat. 313.

⁶ Ross v. Elizabethtown, &c., 1 Green, Ch. 422.

But in a later decision it is held, that notice is not necessary, unless specially ordered by the court, except where it is made after answer filed, and then it may be dispensed with by the court. And in such latter case, although it does not appear that notice was dispensed with, if it was a proper case for so doing, it will be presumed to have been done.¹ (a)

§ 107. In Pennsylvania, an injunction cannot be granted, until the parties complained of have been served with a subpoena to appear and answer; until then, they are not in court.²

§ 108. In New York, on serving an injunction, the plaintiff should at the same time take out and serve such subpoena; but, if the defendant voluntarily appears and answers, the objection for the irregularity is waived.³ Under sect. 220 of the Code, requiring a copy of the affidavit to be served with the injunction, it is sufficient to serve a copy of the complaint, with its verification, upon which the injunction was issued.⁴ An injunction order may be allowed, signed and delivered to the officer, but cannot be served, before the defendant is summoned.⁵

§ 109. In Indiana, a court of chancery will not, where there is no emergency, grant an injunction, unless ten days' notice of the application has been given to the adverse party, or the application relates to a suit pending in the court. But where the court has granted an injunction in a case in which the adverse party was entitled to notice, and the transcript does not show whether notice was given or not, the Supreme Court will presume that the notice was given.⁶ In California, unless notice of the application for an injunction be given for

¹ *Buckley v. Course*, Saxton, 504.

⁴ *Leffingwell v. Chave*, 5 Bosw. 703.

² *Blair v. Boggs, &c.*, 31 Penn. 274.

⁵ *Ibid.*

³ *Parker v. Williams*, 4 Paige, 439;

⁶ *Vance v. Workman*, 8 Blackf.

Seebor v. Hess, 5 Paige, 85; *Marsh v.* 306.

Bennett, 5 McLean, 117.

(a) Where the defendants, husband and wife, were non-residents, and the injunction was served, out of the State, on him, and she could not be found; the service was ordered to be valid, and a copy of the order directed to be served at their dwelling. *Haring v. Kauffman*, 2 Beasl. 397.

the length of time required by § 517 of the Practice Act; if the defendant does not appear, he may move to dissolve.¹

§ 110. Injunctions cannot be granted in the courts of the United States without notice, and hence all of them are special.²

§ 111. It is not sufficient that *an order for publication* has been passed; the publication must be proved, in order to bring a respondent regularly before the court; and where this is not done, and a *pro confesso* taken, a decree perpetually enjoining a judgment at law will be reversed.³

§ 112. An injunction, affecting the rights of a party who has appeared, will not generally be granted on an *ex parte* application, on a supplemental bill, without regular notice; but a temporary injunction may, in the mean time, be granted, if necessary to prevent serious loss or injury.⁴

§ 113. It is said, although the practice in this country is to grant an injunction, on the filing of the bill, without notice to the defendant, yet the complainant must use due diligence in prosecuting his suit afterwards, or the bill will be dismissed. But where, at the time of granting the injunction, a *subpoena* was taken out, returnable at the next term of the court, which was returned, by the sheriff, *not found*; held, the want of service of the *subpoena* was not ground for dismissing the bill. In such case, the sheriff's return upon the subpoena is conclusive.⁵

§ 114. Upon injunctions to stay proceedings at law, the court may direct the *subpoenas* to be served on the law agents of the non-resident parties; but in cases of original bills it will not be permitted, as relief may be obtained in the Federal or State courts of the State or circuit where the party resides.⁶

¹ Johnson v. Wide, &c., 22 Cal. 479.

² Perry v. Parker, 1 W. & M. 280.

³ Moore v. Wright, 4 Stew. & Port.
84.

⁴ Bloomfield v. Snowden, 2 Paige,
355.

⁵ Corey v. Voorhies, 1 Green, Ch. 5.

⁶ Ward v. Sebring, 4 Wash. C. 472.

§ 114 a. A bill for an injunction of a suit, commenced in a circuit court, is not an original suit, within the restrictions of the judiciary act of 1789, c. 20, § 11, and may be brought against one who is a resident in another State, without serving process upon him in the State where the suit is brought.¹

§ 115. Notice to defendants that an injunction would be moved for, delivered to them six days before the commencement of the term, was held sufficient.²

§ 116. In New York, where an answer on oath is waived, and affidavits of disinterested witnesses in support of an injunction are annexed to, and filed and served with, the bill; the affidavits in support of the answer, and upon which the defendant relies in his application to dissolve the injunction, must either be served upon the complainant's solicitor with the answer, or must be served on him the usual length of time before the making of the motion to dissolve the injunction.³

§ 116 a. The (Cal.) statute does not point out any mode for the service of an injunction, but, where personal service is required, the delivery of a copy is essential. It is not, perhaps, necessary to exhibit the original, unless specially requested.⁴

§ 117. A bill of injunction is well served by leaving a copy at the residence of the defendant.⁵

§ 118. The defendant being in contempt for want of an appearance, the common injunction was extended to stay trial on a motion made without notice.⁶

§ 119. The following miscellaneous points have been settled in reference to injunctions.

¹ *Dunlap v. Stetson*, 4 Mas. 349.

² *New York v. Connecticut*, 4 Dall. 386.

1.

³ *Markham v. Markham*, 1 Barb. Ch. 374.

⁴ *Edmondson v. Mason*, 16 Cal.

⁵ *Morris v. Bradford*, 19 Geo. 527.

⁶ *Harrison v. Dixon*, 11 Sim. 123.

§ 120. An injunction properly issued, in support of the *prima facie* right or title of the party seeking it, does not affect or impair the right to a trial by jury.¹

§ 121. Injunction is merely a remedial process, and, where the party obtaining it has also obtained judgment upon his cause, the court will not revise the propriety of granting the writ.²

§ 122. Writs of injunction, auxiliary to a suit pending, are returnable only to the county where such suit is pending.³

§ 123. An injunction in chancery is not equivalent to a release of errors in a suit at law.⁴

§ 123 a. Where no answer had been put in to an injunction bill, leave was granted to *amend*, so as to waive an answer under oath, on payment of costs.⁵

§ 123 b. A reference to a vice-chancellor of a motion to dissolve an injunction does not empower him to authorize an amendment of the bill.⁶

§ 123 c. The amendment of an injunction bill, unless allowed by the chancellor without prejudice to the injunction, displaces the injunction; and the allowance of an amendment by the court, which the complainant could have made as of right, does not necessarily operate a continuance of the injunction until answer.⁷

§ 123 d. For an error in a bill which is amendable, a preliminary injunction will not be refused, although the amendment has not been actually made.⁸

¹ Woodworth v. Rogers, 3 W. & M. 135.

² Hicks v. Davis, 4 Cal. 67.

³ Allen v. Menard, 5 Tex. 378.

⁴ Prodoot v. Doe, 24 Miss. 169.

⁵ Bronson v. Green, Walk. Ch. 486.

⁶ Cowman v. Lovett, 10 Paige, 559.

⁷ Semmes v. Mayor, &c., 19 Geo. 471.

⁸ Packer v. Sunbury, &c., 19 Penn. 211.

§ 123 e. The amendment of a bill under an order obtained as of course, pending notice of motion for an injunction to stay an action, is a waiver of such notice.¹

§ 123 f. In a suit to restrain a lessee from taking down a building erected by him, and for damages; he claimed a right to remove the building. The answer did not deny the right to damages, nor was any proof thereof offered. Injunction being granted and damages refused, and the plaintiff having filed a cross appeal from the judgment, refusing damages; the case was remanded for a new trial on this point, with the right to amend the pleadings so as fairly to present it.²

§ 123 g. An injunction is not affected by an *appeal* from it.³

§ 123 h. Upon a bill for injunction, and appeal after answer, only the case presented by the bill can be considered, unless there is a want of jurisdiction.⁴

§ 123 i. Where one ground of motion to dissolve an injunction was, that no stamp was attached to the petition, and cancelled; the presumption upon appeal, where the record does not show the fact alleged, is, that the stamps were attached, and the ruling of the court below on the motion will not be reviewed on that ground.⁵

§ 124. On application for an injunction, the court may go into the merits, and may dismiss the bill, before answer filed; but the defendant cannot introduce extraneous matter of proof.⁶

§ 124 a. Though the (Md.) act of 1835, c. 380, is no longer in force, yet, by consent, proof may be taken before any one agreed upon, to be used at the hearing in cases of injunction.⁷

¹ *Martin v. Fust*, 1 Turn. & R. 395.

² *Jungerman v. Bovee*, 19 Cal. 354.

³ *Merced Mining Co. v. Fremont*, 7 Cal. 130.

⁴ *Cranford v. Cranford*, 22 Md. 458.

⁵ *Way v. Lamb*, 15 Iowa, 79.

⁶ *Rose v. Hamilton*, 1 Desau. 137.

⁷ *Steigerwald v. Winans*, 17 Md. 62.

§ 125. Injunctions in certain cases may be granted without the filing of a bill.¹ (a) The fact, that the bill was not filed until after the injunction was ordered, is at most but a mere irregularity, which cannot operate a reversal of the order granting it.² No particular form is necessary to the writ.³ The substantial thing is an authentic notification to the defendants of the mandate of the judge, which they must then at their peril obey.⁴

§ 126. Where a bill prays for relief, by way of injunction, and does not pray for the process of injunction, the process cannot be granted.⁵

§ 127. In some cases of injunction, a *receiver* will be appointed. Thus, there was a devise of a house and lot to trustees, for the use of B for his life, then of B's wife, if she survive him; the trustees to convey the same, after the death of B and his wife, to their children. Also to B a legacy for \$2,000. With a part of this \$2,000, B built another house on the land, and was in the receipt of the proceeds. C obtained judgment at law, and issued execution, but failed to obtain payment for want of property subject to execution at law. On bill filed by C, the court appointed a receiver of the rents of the latter house to be applied to the judgments, and enjoined the trustees from receiving the rents.⁶ "But the appointment of a receiver is the exercise of a power in aid of a proceeding in equity and is the subject of sound discretion. The court must be convinced that it is needful and is the appropriate means of securing a proper end. Such an appoint-

¹ Peck v. Crane, 25 Vt. 146.

² Davis v. Reed, 14 Md. 152.

³ Summers v. Farish, 10 Cal. 345.

⁴ Ibid.

⁵ Union Bank v. Kerr, 2 Md. Ch. Decis. 460.

⁶ Johnson v. Woodruff, 4 Halst. Ch. 120.

(a) In Maryland, no injunction to stay a sale, under the act of 1826, c. 192, can be granted, unless the bill be filed by the party, and contain the allegations required by § 8 of that act. Gayle v. Fattle, 14 Md. 69. In California, an injunction is ordinarily to be asked for before the complaint is filed, so that it can issue with the summons, though it does not take effect until the filing of the complaint. Heyman v. Landers, 12 Cal. 107. The provisions of the Revised Statutes of New York, prohibiting the issuing of an injunction before the bill is filed, do not relate to cases where the court have in another way obtained jurisdiction. Matter of Hemiup, 2 Paige, 316.

ment is a strong measure, and not to be exercised doubtingly. Where a party is clothed with title and possession such as are conferred by a lease in writing, and is in the enjoyment of rights apparently legal, a receiver will not be appointed unless under urgent and peculiar circumstances. The plaintiff must show a clear right in such a case, or a *prima facie*, with such attending circumstances of danger or probable loss as will move the conscience of a chancellor to interfere.”¹ So where a bill was filed by the purchaser of land at a sheriff’s sale, praying an injunction to restrain one who entered under the former owner from cultivating turpentine trees, on the allegation of irreparable mischief from the defendant’s insolvency; and it appeared that the defendant entered by virtue of a lease of the trees for making turpentine, made before the sheriff’s sale: held, it would be inconsistent with the relief sought by the bill, to decree the appointment of a receiver of the rent to secure its payment to the reversioner.² So upon a bill in equity for assignment of dower, and a bill by the heirs for an injunction and a receiver, but no allegation that the rents, &c., will be lost by insolvency, or that there is no remedy at law, nor how the rights of the parties are endangered; the application will be refused.³ (a)

¹ Leg. Intel. March, 1868. Per Agnew, J.

² Burns v. Campbell, 3 Jones, Eq. 410.

³ Knighton v. Young, 22 Md. 370.

(a) A late case in Pennsylvania is reported as follows (Oil Co. v. Petroleum Co., Leg. Intel., March, 1868):—

Opinion by Agnew, J. “The original bill in this case prayed for a decree of forfeiture of the lease held by the defendants, and for the appointment of a receiver for the lessee’s share of the oil. The amended bill avers breaches of the covenant in the lease, and a forfeiture thereby, states that an action at law has been brought to enforce the forfeiture, and that this bill is in aid thereof, and then prays for an account of all the oil, and for the appointment of a receiver as before, and in the mean time that the defendants shall be restrained from taking and disposing of any oil obtained upon the land. The prayer for an account being withdrawn, the relief prayed for is the appointment of a receiver of the defendants’ portion of the oil and an injunction to restrain the defendants in the mean time, that is until the suit at law is determined.

“The agreement of 16th March, 1864, is manifestly a lease for years of the corporeal tenement, with an added exclusive right to bore for, obtain, and take the oil found, returning as rent one fourth of the product to the lessor. To obtain and take the lessee’s share of the oil is not waste, but a rightful act under the lease, unless it be forfeited by its own terms. The defendants are in the peaceable

§ 128. Under a bill praying for an injunction and a receiver, the receiver may be appointed before answer.¹

§ 129. An injunction may prohibit any further interference by executors with the estate devised, even before the acceptance of the receiver appointed, if there is no danger of injury to the estate.²

¹ *Johns v. Johns*, 23 Geo. 31.

² *Ib.*

possession of their own term, and have at a vast expenditure of money and labor of themselves and their sub-lessees, fitted up the premises and procured the oil, and have regularly delivered to the plaintiffs their share in payment of the rent, except certain limited quantities, small in comparison with the entire product, which are fairly the subjects of doubt and controversy, and have been for the most part found by the master in favor of the defendants. It is also noticeable that when this lease was made it was unknown to what extent oil would be obtained, and clearly without any anticipation of the immense flow which afterwards occurred. More than one hundred wells have been bored, one of which yielded the enormous quantity of seventeen hundred barrels in a single day, while the aggregate quantity is stated in the bill at three hundred and forty thousand barrels. If we reflect upon the utter impossibility of procuring the barrels, filling and hauling them away, the immense amount and extraordinary flow of this most subtle and inflammable product, wholly unanticipated at the time of the contract, we discover at once that the parties themselves were compelled to abandon the literal terms of the lease and to resort to expedients and substitutes in lieu thereof. Thus we cannot avoid perceiving that the alleged breaches were of exceedingly doubtful character, depending upon an attentive consideration of the facts to be inquired into in the suit at law. The master upon a careful examination of the evidence having resolved these matters of doubt favorably to the defendants, we cannot say there is any well grounded presumption that a forfeiture has occurred. Possibly it may have taken place, but under the circumstances we are by no means convinced of the forfeiture. Without it there can be no waste, and the tenant's appropriation of his own share is rightful.

"What then are we called upon to do? Simply to appoint a receiver to take into custody and to deprive the lessee of his share of the product until the plaintiffs can see whether they will be successful in obtaining a judgment of forfeiture in a doubtful case. No receiver is asked for the landlord's portion, and plainly because as to it the purpose is to require delivery without interruption. The actual purpose is to take into custody that which will be mesne profits in the event of establishing the forfeiture. Look at the case in any direction, and all that is in it is to obtain our assistance in giving effect to an alleged forfeiture, and to restrain the defendants from the exercise of their legal rights under the lease while the plaintiffs are engaged in experimenting at law for the forfeiture. It is not for the protection of a clear and well defined right, and to prevent an irremediable injury which may ensue if we do not intervene, nor is it the ordinary case of one who shows an equitable right in the subject of custody, and asks the court to interfere for its security until the termination of the litigation." Bill dismissed, with costs.

§ 130. The court in England will grant the common injunction on any day, although out of term, and not a *seal* day or a continuation of the seal.¹

§ 131. An injunction does not operate upon proceedings subsequent to its allowance, but before its service.²

§ 132. In reference to the *statutory* provision for the remedy by injunction, it is said by the court in Massachusetts: "Where the legislature have the power to provide redress for either a public or private wrong, the remedy or mode of redress is wholly a subject of legislative discretion. If an injunction is better adapted to accomplish the objects proposed, than any other form of judicial process, there seems no reason why the legislature should not have power to direct."³ (a)

¹ *Reece v. Humble*, 10 Sim. 117.

² Per Shaw, C. J., *Com. v. Farmers'*,

³ *Ramedell v. Craighill*, 9 Ham. 197. &c., 21 Pick. 552.

(a) The Supreme Court of Alabama has power to grant an injunction in a proper case. *Davis v. Tuscumbia, &c.*, 4 Stew. & Port. 421. In Texas, the act of 1846, Hart. Dig. art. 1599, does not apply to injunctions sought for causes arising subsequent to the judgment. *Clegg v. Varnell*, 18 Texas, 294. As to the county jurisdiction in Indiana, see *State v. Michaels*, 8 Blackf. 436. See also *Rosbell v. Maxwell*, 1 Hemp. 25. In New York the *Code* has not, by the union of equitable and legal powers, enlarged in any respect the previous powers of the court to grant perpetual injunctions. *New York, &c. v. Supervisors, &c.*, 4 Duer, 192. The discretion of the commissioner in granting a specific injunction is not restrained, in South Carolina, by the statute of 1840. It continues in force until dissolved by order of the chancellor. *Ellis v. Commander*, 1 Strobb. Eq. 188. The provision of the statute of Georgia of 1811, that "in all cases of injunction, they shall be disposed of, and a decision made, at the second term of said court, held in and for said county where such suit originated," means the second term after the parties are served and the cause set down for trial. *Johnson v. Holt*, 3 Kelly, 117.

CHAPTER II.

BOND OR OTHER SECURITY.

1. Necessity of a bond — practice in different States.
4. Other security.
8. Further security.
9. Filing and acceptance.
12. Form of bond — surplusage.
15. Mode of determining its validity.
16. Parties.
19. Condition.
23. Construction — sureties.
24. Consideration.
25. Effect.
27. Action upon bond.
29. Defence.
32. Pleadings.
34. Judgment.
36. Breach — sureties.
41. Damages — penalty — interest — costs — counsel fees, &c.
57. Effect of an injunction bond upon other remedies.

§ 1. INJUNCTION *bonds* are an ordinary though not an invariable accompaniment of this form of equitable interposition. (*a*)

(*a*) It is said that a preliminary injunction is usually granted, upon such appropriate terms as the court, either with or without suggestion of counsel, thinks it right to impose. *Ewing v. Filley*, 43 Penn. 384. The practice on this subject is various in the different States. In Pennsylvania, courts are bound to require the security provided for in the act of May 6th, 1844, before issuing any injunction, or an order in the nature thereof. *Erie, &c. v. Casey*, 26 Penn. 287. In South Carolina, except where the application for an injunction is for stay of proceedings in an action, a commissioner has no authority to require a bond or other security. *Fant v. Martin*, 10 Rich. 428. In Maryland, where, upon a suit in equity for an injunction, the answers have come in, and they show on their face a case for a perpetual injunction, and the continuance of the injunction is not dependent upon a question of law or fact to be subsequently established, it is unnecessary to require an injunction bond. *Alexander v. Ghiselin*, 5 Gill, 138. Under the Georgia amendatory act of 1842, an injunction may be granted by the judges of the superior courts upon such terms as in their discretion the case may require. They may dispense with security altogether, provided the party, against whom the injunction is to operate, do not need it for his protection. *Gerry v. Durham*, 11 Geo. 9. In Louisiana, where executory proceedings are

It is held that, where the plaintiff moves for an injunction and offers no security for the defendant's damages, the court will require the plaintiff to make out a case free from all reasonable doubt, and especially so where the injunction would stop the defendant's entire business.¹ And an injunction order is not operative, until the written undertaking, required by statute, is given.² One restrained by an injunction from doing a lawful act may recover damages for any injury that he has suffered, in a suit on the injunction bond, if in the usual form.³

§ 2. A defect in the bond does not dismiss the suit.⁴ On the other hand, where a void injunction has been obtained, the bond given to obtain it is not void.⁵ So judgment may be rendered on the bond, though the judgment complained of was void, and the injunction improvidently issued.⁶ So where the injunction is dissolved by rule, on the ground of insufficient security, the defendant may still, on the trial of the merits, claim damages against the principal and surety on the bond.⁷ But a bond is void for want of authority in the commissioner.⁸

§ 3. Where the judge, in an order granting an injunction, neglects to state the amount of the bond as required by statute, he may amend his *fiat*, either before or after the execution of the bond, and it is error to dissolve the injunction for that cause.⁹

¹ Dubois v. Budlong, 10 Bosw. 700.

² Elliott v. Osborne, 1 Cal. 396.

³ Cain v. McGuire, 13 B. Mon. 340.

⁴ Massie v. Mann, 17 Iowa, 131. See p. 68.

⁵ Stevenson v. Miller, 2 Litt. 306.

⁶ Emmons v. McKesson, 5 Jones, Eq. 92.

⁷ Betts v. Mouglin, 15 La. An. 52.

⁸ Fant v. Martin, 10 Rich. 428.

⁹ Dickenson v. McDermott, 13 Tex. 248.

enjoined on the allegations of fraud and payment, supported by affidavit, an injunction bond is not required. Corner v. Zunta, 14 La. An. 861. By an amendment of the Code of Practice, the clerks of district courts may grant orders of injunction, where the judge is absent from the parish or interested; but must always take bond and security from the applicant. Witkowski v. Selby, 15 La. An. 328. In California, whether or not the statute gives the chancellor power to require a bond on the issuance of a temporary injunction, yet he has power to order one as a matter in furtherance of the objects of the litigation and the protection of the subject-matter thereof. If there was a suit pending, the chancellor had authority to order the injunction and the bond Prader v. Purkett, 13 Cal. 588.

§ 4. Security in other form than that of a bond is sometimes required as the condition of an injunction. In a late case in Vermont, the court remarks: "It was formerly the practice in England, and perhaps is at the present time, to order the party on whose application an injunction is granted, when the court require the damages to be paid, if any are sustained, to order such party to pay a sum of money into court, out of which the damages will be paid if in the course of the subsequent proceeding the orator shall be adjudged liable therefor, but in such case before payment can be made out of such fund, the court must proceed to ascertain the amount of the damage which the party is to pay, and order its payment." ¹

§ 5. In New York, upon a bill for an injunction to restrain a sale of the property of the plaintiff, taken on execution against a stranger, a *deposit* or *security* by the plaintiff is not required by the statute, though the injunction master may require it in a proper case; and, if a deposit is made, the defendant, the execution creditor, cannot take it out of court, upon giving security for repayment in case the plaintiff should succeed in the suit.² In the same State, upon application for an injunction against a judgment on the ground of usury, the applicant will not be allowed to give bond, instead of bringing the amount of judgment into court, as directed by the statute, unless he will consent to waive the forfeiture, and pay the amount justly due.³ The provisions of the Revised Statutes on this subject were not repealed by the Code of 1848. An injunction to stay an execution will be set aside, where it was issued without a deposit and bond, or an order of court prescribing a bond in lieu of the deposit to be given. To authorize the court in dispensing with the deposit and bond, there must have been, on the part of the plaintiff, such a fraud, as the substitution of one paper for another, a false statement, &c.⁴

¹ Per Pierpont, J., *Sturgis v. Knapp*, 33 Verm. 520.

² *Hegeman v. Wilson*, 8 Paige, 29.

³ *Gee v. Southworth*, 10 Paige, 297.

⁴ *Cook v. Dickerson*, 2 Sandf. 691.

§ 5 a. In Tennessee it is held, that the power to take a bond, in lieu of a deposit of money, according to the English practice, belongs to a court of chancery independent of statutes, as being necessary and proper for the enforcement of its decrees, and for the successful administration of justice.¹

§ 5 b. In Wisconsin, the Rev. Sts., c. 84, by their true construction, require, in all cases where an injunction is granted, to stay proceedings at law in personal actions, a deposit of the sum for which judgment was rendered, and the execution of a bond to the plaintiff in such sum as the officer allowing the injunction shall direct, conditioned for the payment of such damages and costs as may be awarded at the final hearing of the cause, or a bond in lieu of the deposit in addition to the one last above mentioned, or a bond conditioned for the payment of the judgments and also for the payment of the damages and costs.²

§ 6. In Maryland, where a party applying for an injunction against a suit at law admits that he owes a balance, the court may require such balance to be brought into court to be paid accordingly.³ So an injunction, to restrain a suit upon promissory notes given for the purchase-money of land, will not be granted without an injunction bond; and, if injunction be claimed upon the ground that the vendee has paid taxes on the land which the vendor was bound to pay, the bill should state how much will remain due after deducting the taxes, and the balance should be brought into court to be paid to the vendor.⁴

§ 6 a. In Mississippi, where a fiat for an injunction is granted, the clerk ought not to issue it until the requisite bond is executed; if, however, he do issue it, its service on a party is notice to him that such bond has been duly executed; a sheriff's return, therefore, upon a *fiery facias*, that it was stayed by injunction, will be a *prima facie* excuse upon a motion against him for omitting to make due execution of the

¹ Black v. Caruthers, 6 Humph. 87.

³ Flickinger v. Hull, 5 Gill, 60.

² Cooper v. Tappan, 4 Wis. 362.

⁴ Reynolds v. Howard, 3 Md. Ch. Decis. 331.

See Dungey v. Angove, 3 Bro. Ch. 36.

writ, which will be made conclusive by the production of the injunction, whether a bond were given or not.¹

§ 6 b. Where a subpoena and injunction are combined in the same writ, it is the duty of the clerk to indorse upon it that its effect is suspended as to the injunction until the party execute sufficient bond; until the bond is executed, the writ has not the efficacy of an injunction.²

§ 7. By the practice of the third (United States) Circuit, no money penalty is inserted in an injunction.³

§ 8. Where the security given for obtaining an injunction is not sufficient, further security will be ordered.⁴ And, in general, where an injunction issues without bond, the defendants may petition for an order of court requiring a bond to be given by a reasonable period, or, on default, to have the injunction dissolved.⁵ So, in New York, if the officer granting an injunction neglects to take the bond required by the rules, application may be made to the court for relief.⁶ But a failure to give bond and security, prior to the granting of an injunction, is no cause for dismissing a bill.⁷

§ 9. In Maryland, the mere delivery to the clerk of an injunction bond does not import its acceptance and approval by the court. If, however, the bond remains where it should be if accepted, and the parties act under it, these circumstances are evidence of its acceptance by the proper authority. After overruling a prayer, affirming that acceptance by the court was necessary to an injunction bond, it is error in the court to rule, that signing, sealing, and delivery were sufficient for such bond. Otherwise, if the latter ruling stood alone, since then counsel might have asked the court to rule that delivery included acceptance. Under the act of 1723, c. 8, § 5, application for an injunction bond must be made to the county

¹ *Duckworth v. Millsaps*, 7 S. & M. 308.

² *Ib.*

³ *Low v. Hanel, Wallace, Jr.* 345.

⁴ *Crawford v. Paine*, 19 Iowa, 172; *Moredoc Williams*, 1 Overton, 325.

⁵ *Alexander v. Ghiselin*, 5 Gill, 138.

⁶ *Cayuga, &c. v. Magee*, 2 Paige, 116.

⁷ *Querry v. Durham*, 11 Geo. 9. See p. 65

court, and that court must approve the bond. But it does not appear what is then to be done with such bond, nor is there any provision for recording it. It would seem, however, that it was intended to remain in the clerk's office as a supersedeas to further proceedings.¹ It is not necessary to an injunction that a bond be filed with the bill. Such a bond need not be filed till ordered by the court.²

§ 10. In New York, it is irregular to file an injunction bond before it is proved and acknowledged.³

§ 11. The filing of an injunction bond, and consequent issue of the writ on the same day, are regarded as concurrent acts, and a recital in the bond, that the obligors "have obtained" such writ, will be interpreted in the present tense, and held to refer to the writ actually issued.⁴

§ 11 a. In Kentucky, an injunction awarded to enjoin a judgment at law, with a direction that the bond shall be as the law directs, is sufficiently explicit; but in other cases the order itself ought to direct what kind of a bond shall be taken.⁵ (See § 19.)

§ 12. Conditions in an injunction bond, not required by statute, or broader than those provided by statute, and rendering the bond insensible, are held to be surplusage.⁶ Thus, in a recent case, a statute provided that writs of injunction might be issued upon filing a bond "to respond to all damages and costs." A bond was given to pay "all such damages and costs as shall be sustained and *awarded*" by reason of the injunction. Held, the words "and awarded" might be rejected as surplusage, and the bond enforced.⁷

§ 13. But when the conditions are not such as are prescribed by statute, the bond cannot have the force of a judgment.⁸

¹ *Burgess v. Lloyd*, 7 Md. 178.

² *Negro Charles v. Sheriff*, 12 Md. 274.

³ *Harrington v. American Life Ins. Co.*, 1 Barb. 244.

⁴ *Wallis v. Dilley*, 7 Md. 237.

⁵ *Stevenson v. Miller*, 2 Litt. 306.

⁶ *Johnson v. Vaughan*, 9 B. Mon. 217; *Gully v. Gully*, 1 Hawks, 23.

⁷ *Proprs., &c. v. Mussey*, 48 Maine, 307.

⁸ *Hanks v. Horton*, 5 Tex. 103.

§ 14. The following points are settled in reference to injunction bonds in New York. The undertaking, required, on the making of an injunction order, must be approved and filed with the clerk of the court. In general, an undertaking will be required on an order restraining the defendant temporarily, in connection with an order to show cause. The plaintiff's own undertaking will not be received, unless he can justify as being a freeholder or householder, and worth double the sum specified over and above all his debts and liabilities. A surety, when one is required, must justify in like manner. And a plaintiff, residing out of the State, must give a resident surety.¹ The bond must be absolute for the defendant's damages, and the judge in his discretion may require sureties.²

§ 14 a. The Circuit Court of the United States for the Eastern District of Louisiana, on a bill in equity brought to stay an execution sale, directed an injunction, upon the complainant's giving a bond in the form in common use in courts of chancery, conditioned "to answer all damages which the defendant might sustain in consequence of the injunction being granted, should the same be afterwards dissolved." The condition of the bond filed was "to pay all such damages as the defendant should recover against him, in case it should be decided that the injunction was wrongfully obtained," — the form used in the State courts, under the law of the State (judgment being rendered on the bond for the debt, interest, and damages, and upon dissolution of the injunction); and the injunction was thereupon issued. Held, the United States Court, acting according to the established principles of equity, the acts of Congress, and the practice of the High Court of Chancery in England, and not according to the State law, could not give judgment on the bond upon dissolving the injunction; and the defendant could not enforce the bond till he had recovered a judgment at law.³ (a)

¹ *Sheldon v. Allerton*, 1 Sandf. 700.

² *Bein v. Heath*, 12 How. 168.

³ *Leffingwell v. Chave*, 5 Bosw. 703.

(a) In Tennessee, the usual and proper bond given in chancery, before judgment, is for costs and damages. But it may be to abide by and perform the decree of the court. *Black v. Caruthers*, 6 Humph. 87.

In Iowa, an injunction against a judgment, where it is claimed there is a good

§ 15. When an action is brought on an injunction bond, the law court may look into the proceedings in equity which led to giving the bond, in order to determine its validity.¹ So a reference to the record in a bond makes the record a part of the bond, and, where the description and the proceeding described are both before the court, the latter will control the former.²

§ 16. With reference to the *parties* to an injunction bond, a bond made to A and B, on suing out an injunction to enjoin a judgment in favor of C, for the use of B, is a bond to the "adverse party" within the meaning of a statute.³ So the undertaking, upon the issue of an injunction, is for the benefit of all the defendants that are enjoined, whether they have been served with process or not; and a defendant, obeying the injunction before service, may have damages upon the undertaking, when the injunction is dissolved.⁴ So where a statute required the bond of a person applying for a stay of execution by injunction to be taken in the name of the plaintiff, and a master, on granting an injunction, took a bond payable to himself and his successors in office, and then assigned the bond to the plaintiff; held, the bond was good, and the assignee could sue on it.⁵ In New York, the bond may be signed by a third person, if approved by the judge, and otherwise valid.⁶ In Alabama, a bond to A B, register, appearing on its face to be an obligation taken by him in his official capacity, is good under the Code, § 2973.⁷ In Iowa, the fact that a bond for an injunction, to restrain a county officer from committing a public wrong, is executed to the county judge in his official capacity, instead of the county itself, affords no

¹ *Norris v. Cobb*, 8 Rich. Eq. 58.

² *Williamson v. Hall*, 1 Ohio St. 39 Barb. 16.

190.

³ *Scott v. Fowler*, 2 Eng. 299.

⁴ *Cumberland, &c. v. Hoffman, &c.*, 39 Barb. 16.

⁵ *Gay v. Galliot*, 4 Strobb. 282.

⁶ *Leffingwell v. Chave*, 5 Bosw. 703.

⁷ *Buckner v. Stewart*, 34 Ala. 529.

defence, but that the complainant had been induced by false and fraudulent representations of the opposing attorney to believe that the action had been dismissed, is not within the meaning of § 3778 of the revision of 1860, and the bond need not contain an undertaking "to pay any judgment ultimately to be recovered." *Way v. Lamb*, 15 Iowa, 79.

ground for dissolving the injunction.¹ In Louisiana, an injunction bond to all the obligees by name creates a liability to each, from its essential nature and purpose, though not so expressed, and therefore the party really injured has, under the practice of the State, a separate right of action, and must not join the other obligees.² (See § 26.) In Iowa, an injunction bond, naming only one of two co-defendants as obligee, may be sued upon by the other, under § 1693 of the Code.³ In California, where a bond is given to several, the sole owner of the property, and only party injured, as appears upon the face of the complaint, may sue alone upon the bond. And without demand for unliquidated damages on the parties for whom as sureties the obligors stipulated.⁴

§ 16 a. The principal in the bond cannot object to it on the ground that the only surety should have been made a party to the bill.⁵

§ 17. So much of an order granting an injunction, as directed a particular person to be taken as security, was held to be surplusage, it being the duty of the clerk to approve and accept the security in injunction bonds.⁶

§ 18. Where the principal in an injunction bond, given on an injunction to stay an execution, at the time of its dissolution is not an inhabitant of the State; absolute notice of such dissolution, or a waiver thereof, must be brought home to such principal to charge him, in an action for the amount of the judgment and costs paid by the surety, though the parties were residents of the same State at the time the bond was given.⁷

§ 19. With regard to the terms of the condition in an injunction bond; it is held in New York, that a penal bond with sureties, conditioned to pay such damages as the defendant

¹ Collins v. Ripley, 8 Clarke, 129.

² Connor v. Zuntz, 14 La. An. 861.

³ Rice v. Smith, 9 Iowa, 570.

⁴ Browner v. Davis, 15 Cal. 9.

⁵ Emmons v. McKesson, 5 Jones, Eq. 92.

⁶ Greathouse v. Hord, 1 Dana, 105.

⁷ Iglehart v. Moore, 16 Ark. 46.

may sustain by reason of the injunction, is a sufficient compliance with § 222 of the Code.¹ (See § 12.)

§ 20. A bond, restraining execution creditors from selling certain articles, is merely security to the obligees for any damage they may receive, and not for the amount of the debt; and, if such bond gives the obligees greater security, equity will relieve against it.²

§ 21. Where an injunction bond does not bind the obligors to pay costs, this is not a defect of which they can complain.³

§ 22. Injunction bonds by *executors* should secure to the creditor all the rights and legal consequences, resulting from an unsuccessful prosecution of the injunction, which existed at the time it was obtained, or which followed its dissolution, to the extent of assets at the time of obtaining it; and to that extent the surety is bound also.⁴

§ 22 a. *Sureties* are *quasi* parties to the suit, and a decree may be rendered against them, on motion, without notice or process.⁵

§ 22 b. In an action against a surety in case of injunction of a trial at law, the records of the suits in chancery and at law are admissible, to show dissolution of the injunction and the amount of the recovery at law.⁶ (a)

¹ St. Peter v. Varian, 28 Barb. 644.

⁴ Mahan v. Tydings, 10 B. Mon.

² Hanley v. Wallace, 3 B. Mon. 351.
184.

⁵ Black v. Caruthers, 6 Humph. 87.

³ Gillespie v. Thompson, 5 Gratt.
182.

⁶ Ansley v. Mock, 8 Ala. 444.

(a) In Virginia, if the principal in a judgment procure an injunction thereto, the surety in the judgment not being party to the injunction, upon dissolution of the injunction, the surety in the injunction bond is liable for the judgment debt, before the surety in the judgment. Bentley v. Harris, 2 Gratt. 357. And if the surety in the bond is held insufficient, and a new bond executed with other surety, upon dissolution of the injunction, the sureties in both are equally liable. And if one of such sureties, being about to leave the State, is restrained by a *ne exeat* writ, and he gives a *ne exeat* bond with surety, and conveys land to secure the surety; the injunction being dissolved, the land is primarily liable for his share, as among the sureties and the surety in the *ne exeat* bond, for any deficiency. *Ib.* In case of a creditor's bill, and an injunction bond with surety, if other parties

§ 23. In reference to the *construction* of injunction bonds ; the general principle is held applicable, that the construction of bonds, taken under the provisions of law, is more rigorous than of bonds taken voluntarily.¹ But, as against the surety in a bond, while general and doubtful phrases are to be construed in view of what was sought to be enjoined,² the contract of the surety is within the statute of frauds, and is to be strictly construed, and no parol evidence is admissible to add to, vary, or contradict it in any of its terms. Though a misrecital in the condition, as to the amount of the judgment enjoined, may be corrected by the bill, where the bond contains a plain reference to it ; on the principle that that is certain which can be made certain.³ The securities in an injunction bond, in the usual form, are not only bound for the performance of any final decree against their principal ; but, where he dies before final hearing, and the cause is revived in the name of his administrator, for the satisfaction of the decree rendered against him, costs included.⁴ The securities are estopped from denying that the injunction, recited in the bond, was granted and ordered.⁵ To an action on such bond, the securities cannot plead, that an execution was sued out on the judgment at law, and satisfied by a levy on property, before the final decree in the bill for injunction.⁶

§ 24. The order for the injunction is to be taken in connection with the bond, and, when so taken, sufficiently expresses the *consideration* within the statute of frauds.⁷ So the suspension and delay to be produced by the injunction are *prima facie* evidence of consideration. And a plea, alleging merely the want of consideration, is bad ; it must show that these were not sufficient considerations.⁸

§ 25. In Alabama, a bond which operates to supersede a

¹ Hanks v. Horton, 5 Tex. 108.

⁵ Ib.

² Weatherby v. Shackelford, 37 Miss. 559.

⁶ Ib.

³ Williamson v. Hall, 1 Ohio St. 190.

⁷ Prader v. Purkett, 13 Cal. 588.

⁴ Fowler v. Scott, 6 Eng. 675.

⁸ Mahan v. Tydings, 10 B. Mon. 351.

are admitted to prosecute the bill, the sureties are not discharged, as the proceeding does not increase their risk. Levy v. Taylor, 24 Md. 290.

judgment at law has the force and effect of a judgment, on a dissolution of the injunction, without an order of the chancellor.¹ A statute, requiring the register to certify to the law court the dissolution of an injunction, is mandatory only, and not necessary to an execution on the bond.²

§ 26. It is held that the suit on an injunction bond is properly brought in the name of the party alone interested, though there are several obligees.³ But, on the other hand, debt may be maintained on a bond executed to several jointly in the name of all, for an injury to either by a failure to perform the condition.⁴ (See § 16.)

§ 27. It is sometimes held, that an action of debt on an injunction bond cannot be maintained to recover damages occasioned by the suing out of the writ, unless vexatiously done; upon which point the record of the suit in which the injunction was sued out is admissible, but not conclusive evidence. But on the other hand it is held, that, in an action on the bond, the existence or non-existence of probable cause for the injunction is immaterial.⁵ And the action may be maintained without a previous action on the case, to ascertain the damages occasioned by the vexatious suing out of the writ.⁶ (a)

¹ Wiswell v. Munroe, 4 Ala. 9.

² Ib.

³ Prader v. Purkett, 13 Cal. 588.

⁴ Watts v. Sanders, 10 B. Mon. 372.

⁵ Garrett v. Logan, 19 Ala. 344;

Cox v. Taylor, 10 B. Mon. 17.

⁶ Garrett v. Logan, 19 Ala. 344.

(a) Neither case nor assumpsit can be maintained for the breach of defendant's duty and contract in not permitting one to cut and carry away timber, when the declaration shows that the injury resulted from his being enjoined by the defendant; the only remedy is an action on the injunction bond, if there is a breach of it, or an action on the case averring malice. McLaren v. Bradford, 26 Ala. 616. The Alabama statute of 1826, "to provide a speedy remedy against the obligors in injunction bonds," applies to bonds executed in cases in which the judgment shall have been enjoined. Dunn v. Bank, &c., 2 Ala. 153. In Texas, when the damages sustained by the defendant, by the issuing of an injunction, grow out of other matters than the collection of money, and present questions of difficulty; inasmuch as the statute does not imperatively require them to be settled in the main action, a separate suit may be brought therefor on the injunction bond. Hammonds v. Belcher, 10 Tex. 271. A *scire facias* will lie upon an injunction bond, in North Carolina, it being made part of the record by statute of 1810. Bozman v. Armistead, 2 Taylor, 183. So, though the bond was made before that statute was passed. Bozman v. Armistead, 2 Taylor, 264.

§ 28. The defendant in an injunction suit may plead the damages he has sustained by it, in *reconvention*, or have an action on the bond.¹ But where a defendant sues and obtains judgment at law upon the bond, he cannot afterwards have execution out of the Court of Chancery upon it.²

§ 29. It is a good defence for sureties in the bond, that the complainant was corruptly induced to dismiss his bill, so that the sureties might become liable.³

§ 30. An injunction against a judgment, on the ground of usury, having been properly dissolved, usury cannot be set up as a defence to a suit in chancery to set up the lost bond.⁴

§ 31. After parties have obtained an injunction, it is too late for them to set up, as a defence to the suit on the bond, a want of jurisdiction to grant the injunction.⁵

§ 32. With reference to the *pleadings* in an action upon an injunction bond ; the bond declared on must be described with such precision, certainty, and clearness, as fully to apprise the defendants of the cause of action which they are required to answer. It is sufficient to set forth such facts as constitute a breach. The extent of the damages is matter of proof for the jury.⁶ Thus, when the condition is to pay the balance due upon a certain judgment specifically mentioned and set forth in a decretal order of the court, bearing a particular date, and ten per cent. thereon ; the precise amount of such judgment need not be stated in the declaration, that being a matter of proof, on trial.⁷

§ 32 a. The defendant in a suit at law filed his bill to enjoin a trial, and, pursuant to an order for that purpose, entered into a bond with surety, conditioned to pay the plaintiff "all

¹ Carlin v. Hudson, 12 Tex. 202.

² Harrison v. Casey, 1 Dev. & Bat. Ch. 322.

³ Boynton v. Robb, 22 Ill. 625.

⁴ Clark v. Young, 2 B. Mon. 57.

⁵ Loomis v. Brown, 16 Barb. 325.

⁶ Tallahassee v. Hayward, 4 Flori. 411.

⁷ Ib.

damages which he might sustain by the wrongful issuing out of an injunction," &c. In a suit by the obligee against the surety, the declaration alleged, that the injunction was dissolved, six or seven years after it was awarded; a judgment at law rendered for the plaintiff; the amount thereof; that a *fiery facias* was duly issued thereon, and by the sheriff returned "no property found;" and that, when the judgment was rendered and the execution issued, the defendant was insolvent, and unable to pay the same; by reason of all which the bond became forfeited, &c. Held, that the breach was not well assigned; but it should have been shown what was the condition of the principal obligor when the bond was executed; for, if he was then insolvent, or became so shortly thereafter, and before, in the ordinary course of proceeding, a judgment could have been recovered, if a trial had not been enjoined, the plaintiff would have sustained no "damages," and nothing more than the costs in chancery could be recovered.¹

§ 32 b. Where, in an action on an injunction bond, the recitals and condition of which mentioned a judgment, the defendant pleaded a general performance, the plaintiff assigned a breach, the defendant rejoined *nul tiel record*, and the plaintiff sur-rejoined, traversing the rejoinder, and issue was joined to the court, who found that there was such record; and the plaintiff afterwards introduced a record as evidence to the jury, to support the issue joined on the plea of *nul tiel record*, to which the defendant objected: held, the defendant's rejoinder would have been held bad if demurred to; that the issue was correctly tried by the court; and that the defendant, having admitted, by his pleading, every fact which the record could establish, could not complain of its admission as evidence, whether competent or not, and although such evidence might be unnecessary.²

§ 33. The obligor in an injunction bond cannot, in a suit upon the bond, plead that he did not obtain any injunction.³

¹ *Ansley v. Mock*, 8 Ala. 444.

² *Hardey v. Coe*, 5 Gill, 189.

³ *Lloyd v. Burgess*, 4 Gill, 187.

§ 33 a. In an action on an injunction bond, the only legal evidence of the measure of damages is the judgment or decree in the case in which it is given.¹

§ 33 b. The grounds of injunction cannot be inquired into. It is for the court to determine, whether the injunction was properly issued, and until this has been done no suit can be maintained on the bond.²

§ 33 c. It is not essential that the costs and damages should be awarded upon dissolution of the injunction. A recovery in an action upon the bond would be an award of damages, within the condition.³

§ 34. The *summary judgments* on bonds taken for injunctions under the statute of 1841, in Texas, after the conditions are forfeited, are not in derogation of the right of trial by jury, or of other constitutional rights.⁴

§ 35. Where a bond was taken, which did not in any way comply with the statute, but bound the obligors absolutely to pay the penalty, if the injunction should be dissolved, and not to pay the amount of judgment and costs; held, summary judgment could not be rendered.⁵

§ 36. In reference to what constitutes a *breach* of an injunction bond; if the plaintiff dismisses his bill, the defendant has an immediate right of action on the bond, and need not wait till the order of dismissal is confirmed at the next term of court.⁶ But an injunction bond is not broken so long as the injunction remains in force; nor when an injunction has been dissolved and then reinstated.⁷

§ 37. A bond conditioned, that, if the defendant shall cause certain property (specified) "to be forthcoming, to be subject

¹ Lockwood v. Saffold, 1 Kelly, 72.

² Dowling v. Polack, 18 Cal. 625.

³ Brown v. Groton, 31 Ill. 416; Edwards v. Edwards, 31 Ill. 474; 28 Ill. 240.

⁴ Janes v. Reynolds, 2 Tex. 250.

⁵ *Ib.*

⁶ Roach v. Gardner, 9 Gratt. 89. See Spevey v. M'Gehee, 24 Ala. 476.

⁷ Bentley v. Joslin, 1 Hemp. 218.

to the final order of the court," &c., and "shall abide by and perform such orders and decrees as the said court shall make in the said cause," &c., was construed, *ut res magis valeat quam pereat*, to require the defendant to abide by and perform such orders and decrees as the court shall make touching the property specified, which was to be forthcoming, &c., and not to require the performance of any decree which the court might make.¹ (See § 39.)

§ 38. A suit was brought upon an injunction bond, after the injunction had been dissolved by the Circuit Court, but while an appeal was pending in the Supreme Court, and an order was in force staying all further proceedings therein until further order by the court. The defendant pleaded in bar that no cause of action had accrued at the time the suit was commenced. The plaintiff filed a replication, that, at a day subsequent to the commencement of the suit, the decree of the Circuit Court was affirmed. Held, the replication was not responsive to the plea, and was insufficient.²

§ 39. The *surety* in an injunction bond is liable only according to the strict terms of his undertaking.³ Thus suit was brought against a surety on a bond, which described the judgment enjoined as being for \$2,300 and costs. Held, a judgment for \$2,346, and costs, though answering the description in other respects, could not be shown. Also, as the bond undertook to describe the judgment fully, the petition for injunction could not be referred to for another description of it.⁴ So an injunction bond, conditioned to cause certain property "to be forthcoming, to be subject to the final order of the Court of Equity" in a certain cause, &c., and to "abide by and perform such orders and decrees as the said court shall make in the said cause," was construed, in an action thereon against the surety, not to require the principal debtor to pay, absolutely, any money decree which the court might pronounce. It was held that, before the recovery could be had, the plaintiff must show a failure to produce the property

¹ Aldrich v. Kirkland, 8 Rich. Eq. 349.

² Scott v. Fowler, 14 Ark. 427.

³ Hall v. Williamson, 9 Ohio (N. S.), 17.

⁴ Ib.

specified, and the damage sustained by reason of such failure.¹ (See § 37.)

§ 40. In an action on a bond given on obtaining an injunction to stay a suit at law, it may be alleged and shown, that, by reason of the delay in obtaining judgment and execution, occasioned by the injunction, the property of the defendant in the suit was so wasted, sold, incumbered, and disposed of, that the plaintiff at law lost his debt.² So in case of injunction against selling or intermeddling with goods in order that they may be applied to the plaintiff's and others' debts; in a suit upon the bond, damages may include a loss in the value of the goods during injunction with interest; not over the penalty.³ So where a party is enjoined from taking possession of a farm, from March to September, he is not restricted, in an action on the bond, to the value of the use of the land up to the time of dissolution of the injunction, but may show that by being kept out of the land he lost the crops for the season.⁴ The question is not what the land was worth to the complainant in the injunction suit, but what was the damage to the defendant.

§ 40 a. But the bond is designed to indemnify against immediate and actual loss; not remote injuries, such as injury to credit, resulting from the injunction.⁵ Thus the plaintiff sold coal to the defendant, with the privilege of changing a railroad on the plaintiff's land. The defendant commenced the road, but was enjoined at the plaintiff's suit, and the injunction afterwards dissolved. The defendant did not construct the road, but sold out, and brought an action on the injunction bond. Held, the difference, between the cost of constructing the road when the injunction was laid and when it was dissolved, was speculative and consequential, and improperly submitted to the jury. It would have been otherwise, if the property had remained in the defendant's hands, and he had finished the road at an increased cost.⁶

¹ *Aldrich v. Kirkland*, 6 Rich. 334.

² *Tryon v. Robinson*, 10 Rich. 160.

³ *Levy v. Taylor*, 24 Md. 290.

⁴ *Edwards v. Edwards*, 31 Ill. 474.

⁵ *Hibbard v. M'Kindley*, 28 Ill. 240.

⁶ *Morgan v. Negley*, 53 Pa.; Amer. Law Reg. November, 1867, p. 59.

§ 40 b. A city ordinance having been passed, by authority of the (Md.) act of 1838, c. 266, to lay out a street through the lands of A and B, B obtained an injunction to prevent it, and executed a bond, with the condition, among others, that he would satisfy and pay all damages occasioned by the injunction. After the injunction was dissolved, A sued B on the bond, claiming damages for the alleged depreciation in his land, which was chiefly valuable for building-lots, while the opening of the street was delayed. Held, such claim could only be sustained on the ground, that the injunction infringed or deprived A of some vested legal right which the bond was intended to protect; and, from the nature of the case, neither the public nor any private citizen could acquire any privilege or right to the use of the street, until actually opened and surrendered to the public.¹

§ 40 c. The plaintiff, claiming timber lying on land of the defendants, who also claimed it, sued them, to establish his title. He procured a preliminary injunction, forbidding them to assert their alleged ownership by suit in court, or in any other way, pending the principal suit; but failed in that suit, the court determining that the property belonged to them. In the mean time, the plaintiff carried off the timber, destroyed its identity, and disposed of and converted the proceeds to his own use. Held, the measure of damages, in an action upon the bond, was, *prima facie*, the value of the property.²

§ 41. While damages may be recovered on an injunction bond, when the injunction has been improperly sued out;³ as to the mode of recovery, the practice is not uniform. It is held that, upon the removal of an injunction prohibiting the collection of money, the court should render judgment for the sum enjoined, and the damages assessed, against the principal and his sureties.⁴ While, on the other hand, the obligors in the bond, given on enjoining a judgment, are, on dissolution of the injunction, liable to pay the judgment, though no

¹ *Steuart v. State*, 20 Md. 97.

² *Barton v. Fisk*, 30 N. Y. 166.

³ *Gelston v. Whitesides*, 3 Cal. 309.

⁴ *Cook v. Garza*, 13 Tex. 431; *Burr v. Burton*, 18 Ark. 214.

damages are awarded against the complainant.¹ In a late English case, one claiming copyright in the work of a foreigner assigned to him obtained an injunction, on giving an undertaking to abide by any order of the court respecting damages the defendant might sustain by reason of the injunction. The House of Lords (after conflicting decisions in the courts of law) decided that the plaintiff had no title to copyright, and the injunction was dissolved without opposition. The defendant moved for an inquiry as to damage, but one of the vice-chancellors refused it; and merely dismissed the bill with costs, refusing the plaintiff's motion to dismiss without costs. Held, upon appeal, that the defendant was entitled to an inquiry what, if any, damage he had sustained.² So in New York, where on motion the injunction is dissolved, and thereupon the suit is discontinued and the costs are paid; the court may still order a reference to settle the damages within the terms of the bond, if an action upon the bond may possibly be maintained.³

§ 42. But in the United States Court it is held, that a court of equity cannot order the complainant and his sureties in an injunction bond to pay the damages sustained by reason of the injunction. The defendant must resort to an action on the bond. And it is doubted whether Congress could confer such a power.⁴ So in Illinois, except in cases of injunctions to restrain actions at law, damages cannot be awarded on the dismissal of an injunction bill.⁵ So, in Missouri, upon dissolution of an injunction against the enforcement of a judgment by execution, it is erroneous, in assessing damages, to enter judgment for the debt against the principal and securities in the bond.⁶ And, in California, when an injunction is dissolved, and the suit dismissed by the plaintiff's action, this constitutes no admission that it was improperly sued out, which must be proved before damages can be recovered.⁷

§ 43. Where a bond is conditioned for the payment of such

¹ *Hunt v. Scobie*, 6 B. Mon. 469.

² *Novello v. James*, 31 Eng. Law & Eq. 280.

³ *Carpenter v. Wright*, 4 Bosw. 655.

⁴ *Merryfield v. Jones*, 2 Curt. 306.

⁵ *Phelps v. Foster*, 18 Ill. 309.

⁶ R. C. 1855, p. 1249, §§ 13 and 14; *Roach v. Burnes*, 33 Mis. 319.

⁷ *Gelston v. Whitesides*, 3 Cal. 309.

damages as may be sustained from the suing out of the injunction, "should the same be dissolved," a recovery can only be had for the actual damages.¹ So in a suit on an injunction bond, which stipulates that the complainant should pay to the defendant the damages, not exceeding \$500, which he might sustain by reason of the injunction; the only damages the plaintiff can recover were such as resulted to him individually from the operation of the injunction itself.² So where the injunction sought to restrain the collection of certain notes given to a trustee in consideration of the hire of slaves, and the bond was conditioned for the payment of only the actual damages; a recovery cannot be had for the trouble and expense of a rescission of the contract alleged to have been caused by the pendency of the injunction, nor for the privations and physical hardships to which the beneficiaries of the trust estate were subjected, in consequence of the inability of the trustee to collect and pay over to them the enjoined debts.³

§ 44. In Louisiana, the plaintiff and his surety on the injunction bond are bound *in solido* to the defendant for damages, only on the amount for which the injunction is dissolved.⁴

§ 45. On dissolution of the injunction, and failure of the obligors to perform the conditions, the bond becomes forfeited, and a right of action accrues for the *penalty*, for which penalty, as well as for such damages as the jury may assess, the court is bound to give judgment.⁵ But, in an action of covenant on a bond against the surety, it was held that he was only liable to the extent of the penalty, with interest thereon from the time of forfeiture, although the actual damages exceeded it.⁶

§ 46. Where the bond provided for payment of such damages as should be awarded by any competent court, held, in

¹ Bullock v. Ferguson, 30 Ala. 227.

² Burgen v. Sharer, 14 B. Mon. 497.

³ Bullock v. Ferguson, 30 Ala. 227.

⁴ Perry v. Kearney, 14 La. An. 400.

⁵ Tallahassee, &c. v. Hayward, 4 Florida, 411.

⁶ Hughes v. Wickliffe, 11 B. Mon.

202.

an action against the sureties, the award must be alleged and proved.¹ So a bond, to pay such damages as may be awarded, generally, secures only such as may be awarded in the injunction suit, and, in a suit thereon, the declaration must allege such award.² (a) And where no clause is inserted in the condition of a bond, consenting that the defendant's damages shall be summarily ascertained upon a reference, the court has no jurisdiction to direct a reference for that purpose.³

§ 47. In Virginia, one not party to a judgment, who procures it to be enjoined, is liable to the statutory ten per cent. damages on its dissolution, as much as one who is a party.⁴

§ 48. The right to recover interest on a judgment is a legal incident to the judgment; hence a surety on a bond given to enjoin a judgment is bound for interest to accrue on the judgment.⁵ (See § 53.)

§ 49. An injunction was obtained to stay the collection of a judgment at law. The plaintiff in equity gave a bond to the defendant, who was the plaintiff at law, conditioned to "abide the decision which should be made on the bill, and pay all sums of money, damages, and costs that should be adjudged against him." The injunction was dissolved and the bill dismissed, and the obligor was decreed to pay the costs in the chancery suit. In a suit against the sureties, held, they were not liable for the amount of the judgment enjoined, nor for the costs of the chancery suit, unless the defendant had first paid them to the officers entitled to them.⁶

§ 50. A obtained two judgments against B, and levied executions on land as belonging to B. C, claiming the land,

¹ Tarpey v. Shillenberger, 10 Cal. 390.

² Anderson v. Falconer, 34 Miss. 257.

³ Garcie v. Sheldon, 3 Barb. 232.

⁴ Clayton v. Anthony, 15 Gratt. 518.

⁵ Weatherby v. Shackelford, 37 Miss.

⁶ Corder v. Martin, 17 Mis. 41.

(a) In Virginia, the bond provides in terms for the payment of such damages as may be awarded by the court upon dissolution. The ten per cent. damages given by statute are to be deemed awarded, unless expressly remitted by the court. Clayton v. Anthony, 15 Gratt. 518.

enjoined the sale, and gave D as surety in the bond. The injunction was dissolved, and A brought an action of covenant on the bond. Held, the damages which might accrue by reason of the injunction were the measure of damages, and not the amount of the judgments.¹

§ 51. Where an injunction was obtained upon the sale of certain property, the complainant giving bond to pay all damages; in a suit on the bond, held, the rule as to damages was the difference between the cash value of the property when the bond was given and what it produced when sold, and the interest on the difference.²

§ 52. Where, on an application for an injunction to stay the erection of a mill-dam, the chancellor exacted a bond to pay all damages that might result to the defendant from the injunction, in case the suit was not successful; in a suit on the bond, held, the chancellor had the discretionary power to take such a bond; and, if the complainant failed to prosecute his suit successfully, the defendant was entitled to recover all the damages he had sustained by reason of the injunction.³

§ 53. In an action on an injunction bond, where the injunction forbade the payment of money, interest is recoverable thereon up to the day the money is paid into court, and an offer to invest the amount, less costs and expenses thereon, is not admissible in evidence to reduce the interest.⁴

§ 53 a. Where a debtor is enjoined from paying over the money to his creditor, but not from using it in any other manner, he can only discharge himself from interest by paying the money into court; consequently, in an action on the bond, a recovery cannot be had for interest, by way of damages, for the period intervening between the dissolution of the injunction by the chancellor and the affirmance of his decree on error, no *supersedeas* bond having been given.⁵ (See § 48.)

¹ Hord v. Trimble, 1 Litt. 413.

² Rubon v. Stephan, 25 Miss. 253.

³ Newell v. Partee, 10 Humph. 325.

⁴ Wallis v. Dilley, 7 Md. 237.

⁵ Bullock v. Ferguson, 30 Ala. 227; 25 Ill. 372.

§ 54. A statutory bond, the form of which is prescribed, will have the effect given to it by the statute; and an injunction bond includes costs, if awarded on dissolution of the injunction.¹ Counsel fees, necessarily incurred in the defence of an injunction suit, not consequential on other injuries, but direct and immediate, may be recovered in an action of debt on the bond. Whether they must have been actually paid is a point upon which the decisions are contradictory.² It is said in a late case, that the expression *all costs and damages* includes counsel fees. "It was in contemplation of the defendant to institute legal proceedings, thereby subjecting the plaintiff to costs, and the employment of counsel. He would be necessarily damnified in consequence thereof to the amount he should be compelled to pay such counsel. It was a damage clearly within the contemplation of the act, and of the parties."³ So a restraining order continues until the hearing on the rule to show cause why the injunction should not issue, though it be postponed from the day first fixed; and therefore the bond covers damages during such a continuance. Counsel fees for dissolving the order are recoverable, though paid after that day, provided a retainer was paid before.⁴ (a)

§ 55. The defendant obtained an injunction to restrain the plaintiff from cleaning out a race-way through his premises to the plaintiff's mills, or from drawing water through them from the Miami Canal, and thereupon he gave a bond, con-

¹ Hibbard v. McKindley, 28 Ill. 240.

² Per Davies, J., Corcoran v. Judson,

³ Garrett v. Logan, 19 Ala. 344; 10 Smith (N. Y.), 107.

Thaie v. Quan, 3 Cal. 216; 25 Ill. 372.

⁴ Prader v. Grim, 13 Cal. 585.

See Willson v. McEvoy, 25 Cal. 169.

(a) In case of injunction improvidently issued to stay the collection of a school-tax, instead of the bond required by statute, one was given, conditioned to pay to the collector, &c., of the district, "all moneys and costs due or to become due." Held, in a suit on the bond, the obligors were liable to pay the costs and counsel fees, but not the taxes which were collected of the inhabitants of the district. Ryan v. Anderson, 25 Ill. 372. A strong case of the refusal of *interlocutory* costs, was an application for injunction to restrain the working of a mine. Issues were directed and tried, and resulted in favor of the plaintiff, and the defendants unsuccessfully moved for a new trial. A year after the bill was filed, no answer having been made or required by the plaintiff; he moved for costs of the issues. The defendants expressed an intention to answer. The vice-chancellor, remarking, "I am surprised at their desire to answer," still refused the motion. Malins v. Price, 2 Cou. (33 Eng. Cha.) 190.

ditioned to pay "all moneys and costs due and to become due from him, and all moneys and costs which shall be decreed against him in case said injunction shall be dissolved." Held, in a suit on the bond, for damages sustained by the plaintiff in the stoppage of his mills, that such a loss was included in the bond, although the decree of the court, dissolving the injunction, was for the costs of suit only.¹

§ 55 a. But where B filed a bill, to enjoin the sheriff from paying over to G a certain fund in his hands claimed by G under an execution; and an interlocutory order for an injunction was granted, the condition being that B should give bond with surety to "save harmless the said G from all damage which he may sustain by reason of the making of said order, and the issuing of said writ in accordance therewith": in a suit on the bond, held, G could not recover, as damages, either a counsel fee and other expenses paid (not including costs), of the suit in equity, and a counsel fee incurred in the suit at law on the bond, or interest on the fund during the time it was enjoined in the sheriff's hands.² So, in an action on an injunction bond, a recovery cannot be had for counsel fees in the Supreme Court, to which the injunction suit was removed by the plaintiff below, after the dismissal of his bill by the chancellor.³ So costs imposed on the plaintiff in an action on an injunction bond, as the condition of a continuance, are not recoverable as a part of the actual damages.⁴ And the recovery is limited, in regard to costs and expenses, to such as may have accrued from the time of the issuing of injunction down to the affirmance of the order for its dissolution.⁵ (a)

¹ *Roberts v. Dust*, 4 Ohio (N. S.), 502.

² *Bullock v. Ferguson*, 30 Ala. 227.

⁴ *Ib.*

³ *Gadsden v. Bank, &c.*, 5 Rich. 336. Acc. *Wallis v. Dilley*, 7 Md. 237.

⁵ *Wallis v. Dilley*, 7 Md. 237.

(a) Recent important cases in Vermont involve the question, what parties are entitled to the damages recovered upon an injunction bond. Bondholders of a railroad brought a bill in chancery to set aside a lease of the road, made by the trustees of the bondholders, after foreclosure, and obtained a temporary injunction against the use of the road, giving a bond of indemnity. The bill was dismissed, and damages were awarded to the trustees and lessees, in a greater sum than the amount of the bond. Held, the trustees represented the defendant bondholders only; and the rule of apportionment of the amount of the bond,

§ 56. In an action on an undertaking executed on suing out an injunction, it is no defence that the business enjoined was a public nuisance ;¹ nor, in mitigation of damages or otherwise, in an action against the securities, that the principal is solvent, and able to pay his own debts.²

§ 57. Where the common law gives a remedy for maliciously suing out an injunction without probable cause, such remedy is not merged in the remedy upon an injunction bond.³ But the injunction must be charged in the declaration as an abuse of the process of the court, through malice and without probable cause, otherwise the remedy is on the bond.⁴

§ 58. Damages were refused to a builder against whom an injunction had been sued out, where his whole ground of action was a supposed hindrance thrown in his way in execution of a building contract, which confessedly required

¹ *Cunningham v. Breed*, 4 Cal. 384.

³ *Cox v. Taylor*, 10 B. Mon. 17.

² *Hunt v. Burton*, 18 Ark. 188.

⁴ *Robinson v. Kellum*, 6 Cal. 399.

between the trustees and lessees, was a *pro rata* distribution upon the sum assessed to the lessees, on the one hand, and the share of the rent assessed as damages to the trustees, on the other hand, which would have belonged to, and been received by, the defendant bondholders, had no injunction been granted. *Sturges v. Knapp*, 36 Vt. 439. B, a bondholder, previous to the lease, gave a power of attorney to A to act for him, in regard to the road. A helped prosecute the suit, B assenting. Held, B was entitled to no share of the damages. *Knapp v. Sturges*, 36 Vt. 721. C, who was a bondholder at the commencement of the suit, passed his bonds to D, as collateral security. C afterwards paid all the debt, except a small sum, when the bonds were passed to E, on payment, by the latter, of the rest of the debt, as collateral security for the amount of the debt thus paid, and for a claim due from C. Held, C, having assented to the suit, E was entitled to no share of the damages, although he did not know of such assent. *Ib.* A bondholder participated in the prosecution of the suit, by sending to a committee, appointed to conduct the proceedings, a power of attorney to act for him, perfect in all respects, except in not giving the names of such committee, a space for the names being left blank. Held, he thereby forfeited his share of the damages. *Ib.* An assignee of the bonds, after a decision in the suit, is not entitled to any share of the damages, if his assignor participated in the prosecution of the suit, although he had no notice of such participation. *Ib.* A bondholder, who was out of the State, and whose attorney participated in the prosecution of the suit, is not entitled to any share of the damages, although he disapproved of such participation, if he did not countermand his attorney's acts. *Ib.*

for its execution the use of a sidewalk erected by the plaintiff in the injunction, and for which he had not been compensated.¹

§ 59. An action does not lie for the malicious suing out of an injunction against the plaintiff, until the injunction is finally disposed of, or the suit in which it was sued out is terminated.² (a)

¹ Jamison v. Duncan, 12 La. An. 785.

² Tatum v. Morris, 18 Ala. 302.

(a) While a court of equity does not ordinarily award damages, there are still many exceptions to the prevailing practice. In a very late English case it is held, that, under Sir H. Cairns's act (21 & 22 Vict. c. 27), it is discretionary with the court whether to give damages or leave the plaintiff to recover them at law. Durell v. Pritchard, Law Rep. (Eng.) Eq. March, 1866, p. 243. In the same case it is held, that, under Mr. Rolt's act (25 & 26 Vict. c. 42), where there is no ground for equitable relief, a suit in equity is improper, and damages will not be allowed. Sir G. J. Turner, L. J., remarks, "If we were to entertain the question of damages when the question in other respects fails in equity, the consequence would be to put an end to all actions in cases of this nature, and bring all such cases under the jurisdiction of this court." Durell v. Pritchard, Law Rep. (Eng.) Eq. March, 1866, pp. 243, 250.

CHAPTER III.

DISSOLUTION OF INJUNCTIONS.

1. General nature, purpose, and effect of dissolution.
8. In case of a doubtful claim.
10. A question of discretion.
11. Injurious consequences of dissolving.
12. Miscellaneous points and cases.
20. Dissolving on motion.
34. Dissolving upon answer.
37. Denial in the answer — discretion.
39. Answer not responsive — case of doubt — discretion.
40. Affidavits.
41. Irreparable injury.
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46. Must be *substantial*.
48. Exceptions to the general rule.
50. Implied admission in the answer.
52. Information and belief.
55. Responsive answer — new matter.
58. Replication.
59. Impertinent matter.
60. Effect of dissolution — dismissal of the bill.
68. Partial dissolution.
- 69, 73, 74. Evidence — affidavits.
70. Evidence — depositions.
78. Amendment.
85. Appeal.
86. Exceptions.
- 89 a. Notice — waiver.
90. Laches.
94. Necessity of an oath.
96. Time of considering the motion.
97. Perpetuating an injunction.
98. Revival of injunction.
100. Successive injunctions.
103. Special reasons against dissolving.
105. Dissolving in part.
106. Parties — answer by a part of the defendants.
109. Corporations.
111. Infancy.

- 112. Misjoinder.
- 113. Bill by party having no interest.
- 114. Privileged party.
- 115. Miscellaneous parties.
- 120. Death of party.
- 126. Receiver.
- 129. Local law and practice.
- 143. Terms and effect of dissolution.
- 145. Time.
- 148. Dissolving of injunctions in case of judgments.
- 154. Of executions.
- 161 and n. Of suits at law — damages.

§ 1. THE nature of a temporary and preliminary, as distinguished from a perpetual and final injunction, has been already explained. (See Chap. I.) A necessary incident to injunctions of the former description, is a liability to be terminated or *dissolved* before the termination of the suits in equity, of which they were made a part; and the nature and grounds of a dissolution of temporary injunctions constitute a very copious and important part of the general subject treated in this book.¹

§ 2. It is the general rule, that, if the grounds for a provisional injunction be removed, it will be dissolved.²

§ 3. No precise form is necessary. Thus it is held that a decree, authorizing the payment of money in the hands of a party to the suit, enjoined from paying it out, is a dissolution of the injunction.³

§ 4. The distinction is made, that an injunction may be *discharged* for irregularity, but can be *dissolved* only for want of equity.⁴ (a)

¹ See *M'Brayer v. Hardin*, 7 Ired. Eq. 1.

² *Crook v. Turpin*, 10 B. Mon. 243.

³ *Judah v. Chiles*, 3 J. J. Marsh,

⁴ *Lowe v. Warren, &c., Wright*, 616. 302.

(a) An injunction may always be *vacated* on motion, when the reasons for granting it have ceased to exist. As when a railroad, enjoined for want of legislative authority, have been since expressly authorized to do the acts complained of. It seems, that upon such vacation the party may disregard the injunction, if he will run the risk of the justification; but he certainly may first ask the court to vacate it on motion, and is not driven to an *audita querela*. In this case, the reason given by the court for the injunction was thus removed, but

§ 5. A temporary injunction issued when the bill is filed is granted to protect *prima facie* right or title. Motions to dissolve it must be heard on new evidence. When the answer is filed (in a patent case) denying the validity of the patent, and *prima facie* evidence offered in support of the answer, the injunction will be dissolved, unless the opposite party support the validity of the patent by evidence in rebuttal. The court must weigh the evidence, and retain or dissolve the injunction according to its preponderance.¹

§ 6. The power of dissolving as well as granting injunctions must necessarily rest much in the discretion of the court, and should be exercised so as to prevent injustice.² Improbability in the statements of a bill is a strong ground for dissolving.³

§ 7. When the complainant had due notice of a motion to dissolve an injunction, and he neglected to appear and oppose the motion, the defendant was permitted to take his order dissolving the injunction, with costs.⁴

§ 8. Though a nice or doubtful point of law will not be decided on a motion to dissolve an injunction, but will be reserved for the final hearing;⁵ yet it is the general rule that an injunction will be dissolved, when the plaintiff's legal title is doubtful, and the continuance of the injunction unnecessary for the protection of the plaintiff and injurious to the defendant.⁶ Or, where the complaint does not set forth sufficient facts to entitle the plaintiff to the relief prayed for.⁷ Or shows no necessity for the desired protection, even if the injunction might do no

¹ *Woodworth v. Rogers*, 3 W. & M. 135.

⁵ *Van Kuren v. Trenton, &c. Co.* 2 Beasl. 302.

² *Cammack v. Johnson*, 1 Green, Ch. 163. See § 10.

⁶ *Shrewsbury, &c. v. London, &c.*, 1 Eng. Law & Eq. 122; 12 Geo. 5.

³ *Fowler v. Roe*, 3 Stockt. 367.

⁷ *Sutherland v. Lagro, &c.*, 19 Ind.

⁴ *Kellogg v. Barnes*, Harring. Ch. 192.
^{258.} See § 89 a.

the judge who heard the motion to vacate took a different view of the facts and the law, and upon a new ground, inconsistent with the former one, sustained, and refused to vacate the injunction. The second judge was of opinion, that the injunction could be sustained as to one plaintiff, but not as to the other; but, as it was not a matter of practical importance to have it vacated as to one only, he allowed it to stand as to all. *Wetmore v. Law*, 34 Barb. 515.

harm. The court will not restrain a person in the exercise of any legal right unless justice requires it.¹ Thus A, in pursuance of an agreement with B, received a deed of certain property from B, and took possession of the same, and delivered to B a deed of certain other property, of which B took possession. B afterwards refused to pay the sum which he had agreed to pay for the exchange, and the property which he conveyed to A was found to be incumbered to a greater extent than was stated by him. A thereupon filed a bill, praying that B might be decreed to pay him the sum stipulated, and to reduce the incumbrances to the amount stated. He further obtained an injunction, enjoining B from entering or interfering with the property conveyed to A, or from exercising any act of ownership over it, and from disposing of the property conveyed by A to B, or from selling, incumbering, or in any way impairing the value of any other property in B's possession, or under his control, in the mortgages referred to. On motion to dissolve the injunction, held, as the defendant was not alleged to be insolvent, or unable to pay any amount the court might decree, the injunction was too broad, and must be dissolved.² So the court will not deny a defendant the benefit of his answer, when a complainant has not been diligent in prosecuting his suit, and where no great mischief can be done by dissolving the injunction.³ And an injunction will be dissolved if obtained through *misrepresentation*, whether caused by carelessness, misinformation, or otherwise. As where an injunction upon an action of ejectment was dissolved, on the ground that the equity of the bill was fully answered, and another bill, got up by the same party, and similar in all material respects to the former, with the substitution of a different complainant, was filed, and an injunction obtained thereon through a misrepresentation of facts, no reason appearing or being suggested for instituting another suit. It was held, that to countenance such proceedings would encourage litigation and the multiplication of suits, and by the injunction powers of the court to embarrass and retard instead of promoting justice.⁴

¹ Mullen v. Jennings, 1 Stockt. 192.

² *Ib.*

³ Greenin v. Hoey, 1 Stockt. 137.

⁴ Endicott v. Mathis, 1 Stockt. 110.

§ 9. But in a late case, where, on appeal, the court thought the questions not entirely free from doubt, and the case being one of great importance, in which both parties desired a hearing, they refused to reverse the order of the chancellor retaining the injunction until the final hearing.¹ So on the trial of a rule to dissolve an injunction, as issued improvidently and contrary to law, the allegations of the petition are to be taken as true.² And, upon a motion to dissolve an injunction, the chancellor confines himself exclusively to the consideration of the case or combination of facts set forth in the bill out of which the equity of the injunction arose, and to the answer of the defendant to those facts; and the best test as to what are properly averments of facts in the bill or answer is, whether they are such matters as a witness might properly be called on to prove, or the truth of which must be established by evidence: if not, they are either sheer principles of equity, or some of those public and established facts of which the court is bound to take judicial notice without any proof.³

§ 10. Whether or not an injunction should be dissolved, rests in the discretion of the court.⁴ So also to continue an injunction, where the nature and circumstances of a case require it, and where justice will be attained by that course.⁵ And therefore the dissolution of an injunction is not to be interfered with without strong reason.⁶

§ 11. An injunction granted upon bill, answer, and evidence, taken by commission, will not be dissolved, if the bill show sufficient equity, not denied by the answer, to support it.⁷ So, when dissolution of an injunction is calculated to work an irreparable injury, by depriving members of a corporation of privileges, the value of which cannot be pecuniarily estimated, the injunction cannot be set aside upon giving bond.⁸ Nor will the court dissolve an injunction where the

¹ *Morris, &c. v. Jersey, &c.*, 1 Beasl. 227; *Jersey, &c. v. Morris, &c.*, Ib. 542.

² *Ferriere v. Schreiber*, 16 La. An. 7.

³ *Canal, &c., v. Railroad, &c.*, 4 Gill & J. 1.

⁴ *Shricker v. Field*, 9 Iowa, 366; *Cox v. Mayor, &c.*, 18 Geo. 728; *Semmes*

v. Mayor, &c., 19 Geo. 471; *Fleischman v. Young*, 1 Stockt. 620. See § 6.

⁵ *Nelson v. Robinson*, 1 Hemp. 464.

⁶ *Buchanan v. Ford*, 29 Geo. 490.

⁷ *Hamilton v. Whitridge*, 11 Md.

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⁸ *Knabe v. Fernot*, 14 La. An. 847.

cause would be virtually thereby decided, and the complainants deprived of their remedy, and the answers do not disclose the true nature of the transaction.¹ But, on the other hand, although the equity of a bill is not answered, yet, if the continuation of the injunction is a material injury to the defendant, and its dissolution is no present injury to the complainant, and cannot prejudice his right, the court may in its discretion dissolve it.²

§ 12. A motion to dismiss a petition for an injunction is in the nature of a demurrer, and in deciding upon it the court can only look to the statements in the petition.³

§ 13. Where a judgment has been enjoined, and a new trial at law ordered, the court may afterwards, although no verdict has been certified, if it becomes satisfied that a new trial ought not to have been granted, set aside the order and dissolve the injunction.⁴

§ 14. A special injunction was dissolved, with costs, where office copies of the affidavits in support of it were not obtained upon moving for it.⁵ So, where a petition for an injunction, with a defective jurat, was granted, and a motion made to dissolve it for that cause; and a motion was also made to amend, with an affidavit that the petitioner had sworn to it, when the fiat was issued, before the same judge: held, that the judge might have amended by signing the jurat himself, but that it was a personal matter, within his discretion, and, as he would not do so, it was presumed to be for good reason, and the injunction was held to be rightly dissolved.⁶ But it is not proper to absolutely dismiss a bill or dissolve an injunction, for a deficient injunction bond, or for want of notice; in such cases, an amendment should be allowed.⁷ So the fact, that a bond for an injunction, to restrain a county officer from committing a public wrong, is executed to the county judge in his

¹ *Fleischman v. Young*, 1 Stockt. 620.

² *Bechtel v. Carslake*, 3 Stockt. 244.

³ *Floyd v. Turner*, 23 Tex. 292. See § 31.

⁴ *Vass v. Magee*, 1 Hen. & M. 2.

⁵ *Jackson v. Cassidy*, 10 Sim. 326.

⁶ *Sims v. Redding*, 20 Tex. 386.

⁷ *Gamble v. Campbell*, 6 Florida, 347.

official capacity, instead of the county itself, affords no grounds for dissolving the injunction.¹

§ 15. The question of dissolving an injunction may arise in an appellate court. An order dissolving an injunction is appealable, certainly where it affects the merits of, or involves an adjudication upon, any of the material questions in the principal controversy. And in case of an order dissolving an injunction, which restrained a city from opening a street over certain lands, until an appeal from the verdict which condemned the land and allowed no damages could be determined; the owners were held entitled to an injunction, until the time thus fixed.² So, in Louisiana, an appeal will lie from an *ex parte* order, setting aside an injunction, upon giving bond according to law,³ and the necessary consequence of maintaining the appeal is to reverse the order.⁴ But where an injunction against a judgment was dissolved and the case continued, held, the order dissolving the injunction was not a final order, from which an appeal would lie.⁵ And, as we have seen, the granting and continuing of an injunction rest in the sound discretion of the court below, governed by the circumstances of the case. (See § 35.) Hence a court above will not control that discretion, unless its exercise has been manifestly improper.⁶ And where, on an appeal from such order, the chancellor granted an order staying the proceedings, to restrain which the injunction had issued, until the next sitting of the court of errors and appeals; and a motion was made in that court, at its next sitting, for an order extending the stay until the hearing on the appeal: held, the court had power to make such an order; but the granting or refusing it rested in the sound discretion of the court.⁷ So, if the answer admits the equity in the bill, and alleges such matter as, if proved, would defeat the complainant's equity, although this matter be not strictly responsive to the bill; the Supreme Court will not control the discretion of the chancellor below in retaining the

¹ Collins v. Ripley, 8 Clarke, 129.

² Iowa College v. Davenport, 7 Clarke, 213.

³ Knabe v. Fernot, 14 La. An. 847.

⁴ Trufant v. Cazenave, 14 La. An.

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⁵ Rodman v. Fortine, 2 Met. Ky. 325.

⁶ Dent v. Summerlin, 12 Geo. 5; Loyless v. Howell, 15 Geo. 554.

⁷ Doughty v. Somerville, 3 Halst. Ch.

629.

injunction.¹ And, in Alabama, the Supreme Court will not interfere, by *mandamus* or otherwise, to compel the dissolution of an injunction on the filing of an answer.² So where A had petitioned for a *mandamus* against the commissioner of the land-office, to compel him to issue patents to the petitioner for certain lands; and B obtained a temporary injunction to restrain the petition and the issuing of the patents, claiming some of the lots: on a motion to dissolve the injunction, held, as all the questions could be tried on the petition, and as B and all other parties interested had notice thereof and were bound to come into court and defend their interests, the injunction must be dissolved, though it was doubtful whether on B's bill and A's answer the injunction should be dissolved; and, the time of the injunction having expired before the hearing in the appellate court, though it had not when the motion was heard in the court below, that the injunction should be dissolved.³

§ 15 a. On appeal from an order of injunction, the propriety of the order depends upon the merits of the bill, without reference to answers filed subsequently to the issuing thereof. But such answers may afterward cause the injunction to be dissolved, if they deny or swear away the equity on which it is founded.⁴

§ 15 b. A restraining order, issued to take effect "until the hearing of the whole matter," is dissolved by a refusal at the hearing to grant an injunction, though appealed from.⁵

§ 15 c. An order *pro confesso* having been entered against the defendant, and an injunction issued, he moved, on affidavit, for leave to file an answer and for a dissolution of the injunction. Held, an order allowing the motion as a whole should not be reversed, although the better practice would have been, to make a separate motion to dissolve the injunction after the answer had been put in.⁶ (a)

¹ Hargraves v. Jones, 27 Geo. 233.

² Montgomery, 24 Ala. 98.

³ Smith v. Power, 2 Tex. 57.

⁴ Hyde v. Ellery, 18 Md. 496.

⁵ Hicks v. Michael, 15 Cal. 107.

⁶ Perrin v. Oliver, 1 Min. 202.

(a) See § 85. In California, a motion to dissolve an injunction granted upon

§ 16. On motion to dissolve an injunction, it is held, in Missouri, that the plaintiff is entitled to a trial on the merits, and after it is dissolved to a jury to assess the damages.¹

§ 17. Where an injunction is granted until the coming in of the answer, it will not be thereby dissolved, but will remain to await the order of the court.² So when, on motion to dissolve an injunction, it appears from the answer, that the complainant was entitled to an injunction at the time of obtaining it; it will continue until final hearing or further order, unless the defendant admits everything alleged in the bill, upon which the injunction rests. When that admission is made, and the injunction has been to stay execution at law, the injunction may be dissolved, with a proviso that no more be levied than remains due after allowing everything claimed by the complainant; but when a proper ground for the injunction is admitted by the answer, and there still remains a dispute between the parties, the injunction is always continued until final hearing or further order.³

§ 18. On the dissolution of an injunction, it is of course to order the money to be retained in the office, on affidavit showing a danger of its loss if it goes into the hands of the defendant.⁴

§ 19. It is irregular to dissolve an injunction in court with direction that the order shall not go out, and then in vacation to direct that the order shall go out.⁵

§ 19 a. Maryland Sts. 1852, c. 130, and 1853, c. 344, relat-

¹ Home, &c. v. Bauman, 14 Mis. 74.

² Lane v. Brown, 2 Hay. 215.

³ Turner v. Scott, 5 Rand. 332.

⁴ Randolph v. Randolph, 6 Rand. 194.

⁵ Lynch v. Colegate, 2 Har. & J. 34.

an order to show cause is properly refused. The remedy is by appeal. Curtis v. Sutter, 15 Cal. 259. Where an injunction is granted upon an order to show cause, and after a full hearing on the merits, the defendant is not entitled to move for its dissolution until final hearing; his only remedy is by appeal. The right to move for a dissolution exists only when the injunction has been granted without notice, according to (Cal.) Practice Act, § 118. Natoma, &c., Co. v. Parker, 16 Cal. 83; Natoma, &c., Co. v. Clarkin, 14 Cal. 544.

ing to answers in chancery, do not apply to motions to dissolve injunctions.¹

§ 19 b. A ground of demurrer to the bill may be relied upon, on motion to dissolve an injunction.²

§ 20. A *motion* to dissolve an injunction before answer, and without notice to the complainant, is regular, if made on the ground that, admitting the allegations of the bill to be true, it contains no equity; though it is irregular to dismiss the bill by motion on that ground.³ So where it is shown, by a special plea, that there is no equity in the bill, it is held to be the same, so far as regards the motion to dissolve, as though the equity of the bill was fully denied by the answer.⁴ (See § 34.) So an injunction will be dissolved, on motion, at the return term of process, if the complainant has taken no steps to have process served, without an answer of the defendant, although he has appeared by attorney.⁵

§ 21. In New York, where an injunction has been granted by a judge at chambers, a motion for its dissolution may be made directly to the court, without having first applied to him.⁶

§ 22. General notice of a motion to dissolve an injunction for want of equity is sufficient; but any special ground, not touching the equity, should be stated.⁷ A notice to dissolve an injunction "for irregularity in the proceedings" is not sufficiently specific. The irregularity should be pointed out.⁸

§ 23. A motion to dissolve the injunction on the matter of the bill only must be viewed as if it were an original application for an injunction, and opposed by the defendant.⁹

¹ Dorsey v. Hagerstown Bank, 17 Md. 408.

² Hudson v. Maddison, 12 Sim. (35 Eng. Cha.) 416; Jones v. Del Rio, Turn. & R. 297.

³ Beard v. Geran, Hardin, 12; Harring. Ch. 162.

⁴ Eldred v. Camp, Harring. Ch. 162.

⁵ Hightour v. Rush, 2 Hay. 361.

⁶ Woodruff v. Fisher, 17 Barb. 224.

⁷ Morris, &c. v. Bartlett, 2 Green, Ch. 9.

⁸ Miller v. Traphagan, 2 Halst. Ch. 200.

⁹ New York, &c. v. Fitch, 1 Paige, 97.

§ 24. A motion to dissolve an injunction for want of equity on the face of the bill, in the absence of a rule of court to the contrary, will be heard before answer filed, and at any time, unless for special cause shown.¹

§ 25. On a motion to dissolve an injunction, the parties stand before the court as to all those facts and circumstances of which it is bound to take notice ; as where a dissolution is asked for on the ground that the facts set forth in the bill give rise to no equity for an injunction ; and where the facts, as stated in the bill, give rise to no such equity, the injunction will be dissolved, whether the defendant has answered or not, or however imperfectly he has answered.²

§ 26. A judge of the Superior Court of Georgia may dissolve an injunction in vacation ; and under the rule of court, directing injunctions to be granted "until further order," an injunction may be dissolved before answer, on affidavit, denying the equity of the bill. Where the defendants had established their right at law, it was held that the injunction should be dissolved, on their giving a forthcoming bond, and, on application of other parties interested in the judgments, that the complainants should be compelled to amend their bill by making them defendants, without prejudice to the injunction, and that, on their refusal, the injunction should be dissolved.³

§ 27. An injunction granted by a justice of the Supreme Court, in Michigan, in cases where the statute authorizes it, stands upon the same footing as if granted by the chancellor ; and in either case it is competent for the defendants, in vacation, and before they put in their answer, to move to dissolve the injunction for want of equity in the bill.⁴

§ 28. But a motion to dissolve an injunction for want of

¹ *Morris, &c. v. Biddle*, 3 Green, Ch. 222 ; *Woodhull v. Neafie*, 1 Green, Ch. 409 ; *Jones v. Commercial, &c.*, 5 How. Miss. 43 ; *Minturn v. Seymour*, 4 John. Ch. 178.

² *Canal, &c. v. Railroad, &c.*, 4 Gill & J. 1.

³ *Read v. Dewes*, Charl. R. M. 358.

⁴ *Cooper v. Alden*, Harring. Ch. 72.

equity cannot be heard before the return of process.¹ So, after an injunction has been ordered to stand to the hearing, it seems to be irregular to dissolve it, on motion, before the hearing;² while, on the other hand, though an order for dissolving an injunction, on terms, might be discharged on motion or petition, the proper course is to discuss the merits of the order, upon a rehearing.³ So a motion to dissolve an injunction before answer is held to be irregular; at all events, it ought not to be entertained, after a general demurrer has been set down for argument, and before argument.⁴ In Kentucky, the chancellor has no right, at the appearance term, and before the filing of an answer, to dissolve an injunction or dismiss a bill, if the bill contains equity.⁵ So, in Tennessee, a motion to dissolve an injunction will not be heard until after answer filed, or its equivalent.⁶ So where, after five years from the filing of a bill, an injunction was granted for want of an answer; held, the injunction should not be dissolved until the answer came in, though the defendant lived abroad. And, on the other hand, where it appeared that copies of the bill had been sent to the defendant, by his attorney (upon whom service of the *subpoena* had been made at the time of filing the bill, and held sufficient by the court), and also by the complainant, and that a sufficient time had elapsed for the answer to have been transmitted to the court, but it did not appear that an appearance had been entered by the attorney, or that a *pro forma* attachment had been served upon him; it was held, that the bill should not be taken *pro confesso*.⁷

§ 29. A defect in the bond may be a good cause for dissolving the injunction on motion, but is no ground for dismissing the bill, which prays other relief.⁸

§ 30. On notice of a motion to dissolve an injunction given before answer, an answer filed after the motion, though before

¹ Barton v. Lytle, Cooke, 89.

² Smith v. Harkins, 4 Ired. Eq. 486.

³ Van Bergen v. Demarest, 4 John. Ch. 35.

⁴ Ransom v. Shuler, 8 Ired. Eq. 304.

⁵ Judah v. Chiles, 3 J. J. Marsh. 302.

⁶ Rentfore v. Dickinson, 1 Overton, 196.

⁷ Read v. Consequa, 4 Wash. C. 174.

⁸ Boswell v. Wheat, 37 Miss. 610; Pillow v. Thompson, 20 Tex. 206.

the day fixed by the notice for the hearing of the motion, cannot be read in support of it.¹

§ 31. On a motion to dissolve an injunction before answer, the material allegations in the bill, relied upon as ground of injunction, are to be taken for true.² The motion is like a demurrer.³

§ 32. Before the plaintiff can oppose the dissolution of an injunction, on the ground that one of the defendants has not answered, he must have taken the proper steps to compel an answer, or must show a sufficient excuse for the omission.⁴

§ 33. Where a bill of injunction has been taken for confessed, for want of an answer, a motion to dissolve the injunction by the defendant in contempt, on the ground that it was improvidently granted, will not be entertained.⁵

§ 34. The usual method of obtaining a dissolution of injunctions is by *answer*. (a) But it is held that an order *nisi* for dissolution cannot be obtained on putting in a *plea*. The vice-chancellor says: "It cannot stand for a moment. The order *nisi* begins with a recital that the defendant has put in a full answer, and thereby denied the plaintiff's equity."⁶ (See § 20.)

§ 35. And although the ordinary mode of dissolving injunctions is by the answer of the defendant; (b) yet an application

¹ *Cattell v. Nelson*, 3 Halst. Ch. 122.

² *Schwarz v. Sears*, Harring. Ch. 100. See § 106.

445; 25 Ill. 257. See § 12.

³ *Titus v. Mabes*, 25 Ill. 257.

⁴ *Ward v. Van Bokkelen*, 1 Paige,

100. See § 106.

⁵ *Turpin v. Jefferson*, 4 Hen. & M. 483.

⁶ *Wroe v. Clayton*, 10 Sim. 185.

(a) A motion to dissolve an injunction upon pleadings only should not be granted, where the answer denies all the material allegations of the complaint. *Johnson v. Wide, &c.*, 22 Cal. 479.

(b) It seems to be irregular to grant an injunction until the coming in of the answer, and then to stand dissolved, without a rule *nisi*. *Ross v. Woodville*, 4 Munf. 324. The course of practice on this subject is thus described. Injunction causes, upon motions to dissolve, are usually heard on bill and answer. Allegations in the answer, not responsive to the bill, without proof, do not affect the injunction. At a final hearing, the defendant need not prove his allegations in avoid-

to dissolve an injunction upon the answer alone, as in case of mere motion, rests in the sound discretion of the court.¹ (See § 15.) The court may, in case of real doubt as to the equity of the bill, retain the injunction until the final hearing, or drive the defendant to a demurrer.² An injunction may be continued to the hearing, though the equity of the bill is fully answered by the defendant. Where its dissolution would work a greater injury than its continuance, the question of continuance must rest in discretion, though controlled by rules.³ So, notwithstanding a complete denial of the equity of the bill, the court may, at a hearing on the bill and answer, retain the injunction in so far as it finds in the facts disclosed good reason for so doing.⁴

§ 36. An irregularity in an injunction bill and affidavit is not waived by putting in an answer, where the answer is not relied on in the motion to dissolve. But an insufficiency in the affidavit is error, and cannot be waived, nor amended, at the hearing of the motion to dissolve.⁵

§ 37. Notwithstanding the discretionary power on the subject (see §§ 13, 35) it is the general rule, that an injunction will be dissolved, at the hearing of a motion to dissolve it on bill and answer, if the answer fully, fairly, plainly, distinctly, and positively denies the allegations in the bill, on which the injunction was granted.⁶ (a) And if the bill is not supported

¹ *James v. Lemly*, 2 Ired. Ch. 278 ; 9 N. H. 230 ; 2 Geo. Dec. 15 ; *Swift v. Swift*, 13 Geo. 140. See §§ 15, 39.

² *McKibbin v. Brown*, 1 McCart. 13.

³ *Chetwood v. Brittain*, 1 Green, Ch. 439.

⁴ *Miller v. Bates*, 35 Ala. 580.

⁵ *Perkins v. Collins*, 2 Green, Ch. 482.

⁶ *Mims v. M'Lean*, 6 Jones, Eq. 200 ; *Jones v. McKenzie*, Ib. 203 ; *Harris v. Sangston*, 4 Md. Ch. Decis. 394. See § 41.

ance in the first instance. The complainant must then establish his case, and all his allegations then not proved are taken against him. *Hutchins v. Hope*, 7 Gill, 119.

(a) The general rule is sometimes affirmed by statute. In Maryland, the Code, art. 16, § 103, in regulating the effect of answers in chancery, excepts motions to dissolve an injunction ; parties are therefore remitted to the ancient and well-established rule in equity practice and pleading, that, in a motion to dissolve, the answer, if responsive to the bill, is evidence for the defendant, and, if the material allegations are denied by the answer, the injunction must be dissolved. *Hubbard v. Mobray*, 20 Md. 165. The rule more especially applies, where the

by proof.¹ Or where the answer denies *the equity charged in the bill*.² (a) And a responsive answer must be taken as true.³ In such case the injunction cannot be sustained unless there be some special reasons to authorize it.⁴ Thus where the answer denies the equities in the bill, and there is no replication, the injunction will be dissolved, unless the plaintiff offers satisfactory affidavits, that he has witnesses to disprove the answer, whom he can produce by the next term, but has not been able to procure since the answer.⁵ So in case of a naked claim of property and for damages, denied by the answer; the court dissolved the injunction.⁶ So where a bill was filed to ratify a written agreement, and all the matters charged outside of the agreement were denied in the answer.⁷ So where every material allegation of a bill to stay waste is expressly and plainly denied in the answer.⁸ So where a bill to enjoin a trespass upon real estate, together with the answer responsive to the bill, showed a lease in the defendant older than the complainant's title.⁹ So an injunction was granted, and a receiver appointed before answer, upon a bill by a judgment creditor, who, after exhausting his remedies at law, was seeking to enforce, by bill in equity, his judgment lien against personal property covered by a mortgage. The only allegations of the bill, authorizing this equitable interference, were, that the mortgagor, the judgment debtor, was in possession of the prop-

¹ Doolittle v. Jones, 2 Cart. 21.

² Masterton v. Barney, 8 Stockt. 26; Armstrong v. Sanford, 7 Min. 49; Lindsay v. Etheridge, 1 Dev. & Bat. Ch. 36.

³ Colvin v. Warford, 17 Md. 433; 36 Ill. 226.

⁴ West v. Rouse, 14 Geo. 715; Gardner v. Perkins, 9 Cal. 553; Hemphill v. Rackersville, &c., 3 Kelly, 435; Sharpe v. King, 3 Ired. Ch. 402; Smith v. Harkins, 3 Ired. Ch. 613; Radcliffe v. Alpress, 3 Ired. Ch. 556; Wooden v. Wooden, 2 Green, Ch. 429; Moore v. Ferrell, 1 Kelly, 7; Jones v. Joyner, 8 Geo. 562; Green v. Phillips, 6 Ired.

Eq. 223; Boring v. Rollins, 20 Geo. 623; Miller v. Maddox, 21 Geo. 327; Lively v. Bristow, 12 Tex. 60; Greenin v. Hoey, 1 Stockt. 137; Cowles v. Carter, 4 Ired. Eq. 105; Alexander v. Markham, 25 Geo. 148; Weaver v. Garner, 28 Geo. 503; Gravely v. Southerland, 29 Geo. 335; Clark v. Cleghorn, 6 Geo. 220; Perkins v. Hollowell, 5 Ired. Eq. 24.

⁵ Farrell v. M'Kee, 36 Ill. 226.

⁶ Burnett v. Whitesides, 13 Cal. 156.

⁷ Edmondson v. Jones, 19 Geo. 19.

⁸ Wright v. Grist, 1 Busb. Eq. 203.

⁹ Field v. Howell, 6 Geo. 423.

facts set forth in the complaint are improbable in themselves, and affidavits are filed in support of the answer, and there are no counter affidavits. Schoeffler v. Schwarting, 17 Wis. 30.

(a) One who relies upon any other grounds must, in his notice, specify them. Brown v. Winans, 3 Stockt. 267.

erty, selling and converting the same to his own use, that he was insolvent, and that the complainant was thereby in danger of losing his debt. These charges were denied by the answer, but the court below, without proof on either side, refused to dissolve the injunction, and discharge the receiver. Upon appeal, it was held, that the injunction should have been dissolved, and the receiver discharged.¹ So a bill alleged that a certificate for a preëmption claim was obtained by false swearing. The purchaser and grantee under the certificate answered, that he purchased for value and without knowledge of the alleged perjury. Held, that an injunction, to restrain such purchaser from taking possession under a recovery in ejectment founded on his grant, must be dissolved.² So where the complainant admitted that his only means of establishing his case was by a discovery from the defendant, who answered and denied all equity.³ So where an injunction has been granted against the assignee of a bond, at the instance of the surety, to restrain collection of the bond out of the property of the surety, on the ground that the creditor has given time to the obligor without consent of the surety; and it appears that the assignment was not made in the presence of the assignee, or by her immediate action, but through the intervention of her son and agent; and the bill merely alleges that the complainant believes and charges that notice of the existence of the suretyship was communicated to the agent at the time of the assignment: the denial by the defendant of all knowledge, information, or belief that such notice was communicated to her agent, the agent being dead, is a sufficient denial of the equity of the bill to entitle the defendant to a dissolution of the injunction.⁴ So an injunction, to restrain the enforcement of a judgment upon a note in favor of an assignee, was granted, upon a bill alleging that the note had been paid and agreed to be surrendered, and that nevertheless it had been assigned to the judgment plaintiff, who had full knowledge of the equity of the complainant. From the answer it appeared that a new agreement was in the hands of the plaintiff, which was to stand in lieu of the note, unless

¹ *Furlong v. Edwards*, 3 Md. 99.

² *Fowler v. Roe*, 3 Stockt. 367.

³ *Evans v. Lovengood*, 1 Jones, Eq. 298.

⁴ *Kaighn v. Fuller*, 1 McCart. 419.

the maker could obtain it from the assignee and surrender it, which he could not do. Held, that the injunction must be dissolved.¹ So a complainant alleged that he was the owner of four shares in an estate represented by the respondent, administrator *de bonis non*; that he became the purchaser of the property belonging to the estate, for which he gave his notes, with an understanding with the then executrix, that they should be paid by allowing his shares; that suit had been instituted against him upon the notes, and was proceeding to judgment; and prayed that the judgment might be enjoined and the agreement enforced. Held, upon the coming in of the answer distinctly denying that the estate owed the complainant anything, and stating that the four shares claimed had been paid him, the injunction was properly dissolved.²

§ 38. The distinction is made, that, where a motion to dissolve an injunction is submitted on bill and answer, and the bill contains equity on its face, the material allegations of which are denied by the answer; the injunction should be dissolved, and, if desired, the cause should be set for hearing on bill, answer, and proofs; otherwise, at once dismissed. But where the bill does not contain sufficient equity on its face to authorize relief, the injunction may be dissolved, and the bill dismissed, without consulting the complainant.³

§ 39. But, as already suggested, where the answer to a bill for an injunction does not respond to a material allegation, the court will not dissolve the injunction on the coming in of the answer, but will order it to be continued to the hearing.⁴ (See §§ 35, 55.) So where the *gravamen* of a bill is not fully answered, and the answer is otherwise vague, general, and indefinite, an injunction will not be dissolved.⁵ So where the denial consists of matter of opinion only.⁶ And the further general rule, to which we have already adverted, is laid down, that, where the answer has denied the equity of a bill, a dis-

¹ Woodfin v. Johnston, 1 Jones, Eq. 317.

² Ford v. Tison, 8 Geo. 466.

³ Williams v. Berry, 3 Stew. & Port. 285.

⁴ Rich v. Thomas, 4 Jones, Eq. 71.

⁵ Horn v. Thomas, 19 Geo. 270; Pledger v. M'Cauley, 25 Geo. 46.

⁶ Callaway v. Jones, 19 Geo. 277.

solution does not necessarily follow, but rests in the discretion of the court.¹ So where a strong presumption appears in the bill, that the complainant may be entitled to relief upon the final hearing, and in the mean time might suffer irremediable injury, the court will not dissolve an injunction, although the general equities of the bill are denied in the answer.² Though the case must show at least a strong probability that the ends of justice will be best answered by a continuance of the injunction. That such continuance will ruin the defendant's business is a point for consideration.³ The case should be one, where a dissolution would deprive the complainant of all relief, if he should finally succeed, or subject him to some peculiar hardships, while its continuance could be only a temporary inconvenience to the other party.⁴ So, upon the hearing of the answer, if the statements are such as to leave in the mind of the court a reasonable doubt whether the plaintiff's equity is sufficiently answered, the injunction will not be dissolved, but will be continued to the hearing.⁵ In a leading case it is remarked: "It is true that it was said by Lord Eldon in *Clapham v. White* (8 Ves. R. 36, 37) that, 'If the answer denies all the circumstances upon which the equity is founded, the universal practice, as to the purpose of dissolving or not reviving the injunction, is, to give credit to the answer; and that is carried so far that, except in the few excepted cases, though five hundred affidavits were filed, not only by the plaintiff but his many witnesses, not one could be read as to this purpose.' This is strong language, but many qualifications must be engrafted on it, as will be manifest from the learned chancellor's own decision in *Peacock v. Peacock* (16 Ves. R. 49), and *Norway v. Rowe* (19 Ves. R. 144), and indeed as his own exceptive words clearly import."⁶ In breaking the general rule, the court will take into consideration the consequences to follow upon the dissolution, and the conduct of the complainant in prosecuting his suit.⁷ Where a special injunction is granted on the allegation by the plaintiff that irreparable injury to him

¹ *Crutchfield v. Danilly*, 16 Geo. 432; *Nelson v. Robinson*, 1 Hemp. 464.

² *Linton v. Denham*, 6 Florida, 533.

³ *Furman v. Clark*, 3 Stockt. 135.

⁴ *Scott v. Ames*, 3 Stockt. 261.

⁵ *Monroe v. McIntyre*, 6 Ired. Eq. 65.

⁶ Per Story, J., *Poor v. Carleton*, 3 Sumn. 75.

⁷ *Greenin v. Hoey*, 1 Stockt. 137.

will result from the contemplated act of the defendant, and the defendant in his answer, sworn to, denies that such injury will result, the court will not dissolve the injunction, but continue it to the hearing.¹ In illustration of these rules, where the prayer of the bill was for an injunction to restrain a suit at law, in which the defendant in equity sought to recover of the plaintiff the value of work performed by the latter, and the bill alleged that this work was performed for the benefit of a partnership existing between the parties, and ought to be taken into the partnership account, and the answer denied all the equity of the bill; the court held that there was nothing in the circumstances of this case to take it out of the general rule, and that the only effect of dissolving the injunction would be to permit the question to be tried in regular course in a suit at law.² And, in general, if in the answer the facts on which the complainant grounds his equity are positively denied, or the truth of them is greatly impaired by the facts and circumstances stated in the answer, and the defendant swears that he has no knowledge of the truth of the complainant's allegations, and that he disbelieves them; if from the facts and circumstances so set forth and sworn to the complainant's equity is rendered doubtful, the court will dissolve the injunction.³

§ 40. The question, as to dissolving an injunction upon the answer, sometimes depends in part upon accompanying evidence offered by one or both of the parties. Where an injunction is granted, and the answer denies all the material allegations of the bill, which are supported only by several *ex parte* affidavits; the injunction must be dissolved; — no weight will be given to such affidavits.⁴ (a) (See § 69.) But a motion to

¹ Troy v. Norment, 2 Jones, Eq. 318.

² McFarland v. McDowell, 1 Car. L.

³ Hollister v. Barkley, 9 N. H. 230; R. 110.

Cornwise v. Bourgum, 2 Geo. Decis. 15.

⁴ Withers v. Dickey, 1 Stew. 190.

(a) In Maryland, where the material allegations of a bill are denied by the answer, the motion to dissolve must prevail, unless the bill can be supported by testimony taken under the act of 1835, c. 380, § 8. Washington, &c. v. Green, 1 Maryland Ch. Decis. 97. The rule, that an application to dissolve a preliminary injunction before answer requires an affidavit in answer to those upon which the injunction was founded, is a rule of practice for the relief of the

dissolve an injunction cannot be sustained merely upon affidavits, when the answer does not sufficiently deny the equity of the bill.¹ And an injunction granted on notice, and after hearing upon affidavits on both sides, and especially upon the affidavits of the defendants themselves, going to the merits, will not be dissolved on the answer of the defendants.² In cases of the common injunction, issued for not answering at the prescribed time, it is of course to dissolve the injunction, if the answer denies the whole merits; and the plaintiff will not be permitted to read affidavits contradicting the answer, upon the motion to dissolve.³

§ 41. The frequent, and perhaps general language of the cases upon this subject, speaks of the *equity of the bill*.⁴ As already suggested, an injunction will not be dissolved as of course, though the equity of the bill is denied by the answer. If by such dissolution the complainant is likely to be deprived of all the benefits of the suit, it will not be dissolved.⁵

§ 42. Nor, in general, in case of irreparable mischief,⁶ or where fraud is the *gravamen* of the bill set up.⁷

§ 43. And it remains to be more fully explained, that an injunction will not be dissolved, when the answer does not deny clearly, explicitly, positively, and satisfactorily the equity of the bill.⁸ More especially, where an answer did not deny the allegation in the bill, and there seemed to be some equity in the complainant's claim to have the fund in litigation applied as prayed for, which claim might be enforced at the hearing, an injunction was retained by the court until the

¹ Bouldin v. Baltimore, 15 Md. 18.

² Sinnickson v. Johnson, 2 Green, Ch. 374.

³ Poor v. Carleton, 3 Sumn. 70.

⁴ See Anderson v. Reed, 11 Iowa, 177; Stevens v. Myers, ib. 183; Dorsey v. Hagerstown, &c., 17 Md. 408.

⁵ Attorney, &c. v. Oakland, &c., Walk. Ch. 90. See § 37.

⁶ Poor v. Carleton, 3 Sumn. 70; Cornwise v. Bourgum, 2 Geo. Decis. 15.

⁷ Dent v. Summerlin, 12 Geo. 5.

⁸ Thomas v. Horn, 24 Geo. 481; 1 Md. Ch. Dec. 127; Atty., &c. v. Oakland, &c., Walk. Ch. 90; Schermerhorn v. Merrill, 1 Barb. 511; Thompson v. Adams, 2 Cart. 151.

court, and not for the protection of the complainant, and does not apply, unless the allegations of the bill and the plaintiff's special affidavit are disputed. Kneedler v. Lane, 3 Grant, 523.

hearing.¹ So an answer founded upon hearsay is not sufficient to remove the complainant's equity, though, resting upon the information derived from others, it denies the facts out of which that equity arose. Credit can only be given to the answer, in so far as it speaks of responsive matters, within the personal knowledge of the defendant; and unless, so speaking, the equity of the bill is sworn away, the injunction cannot be dissolved.² Nor if an answer does not deny the averments in which the equity of the bill consists, but only states, "that respondent does not believe, and cannot admit, that the said attorney made any such arrangement or contract as set forth in the bill."³ Nor where the equity of the bill is not charged to be within the knowledge of the defendant, and he merely denies all knowledge and belief of the facts alleged.⁴ Thus the answer of an executor, that he was not privy to the fraud charged against his testator, and that he disbelieved the facts alleged, from his confidence in his integrity, is not sufficient to dissolve an injunction to restrain proceedings at law in favor of the estate.⁵ So, while any material allegation of an injunction bill remains unanswered, the equity is not all sworn off, and the injunction will not be dissolved;⁶ and the allegations not denied are taken to be true.⁷ The distinction is made, that, if the allegations be weakly made in the bill, as upon belief merely, and strongly denied in the answer, the injunction should be dissolved.⁸ But in order to warrant a dissolution, it is necessary that the answer should deny any material allegations, with the same clearness and certainty as they are charged.⁹ It must appear that the answer fully meets the plaintiff's equity. It must not be deficient in frankness, candor, or precision, nor must it be illusory.¹⁰

§ 44. And the answer can be regarded only so far as it is

¹ *Clark v. Martin*, 4 Edw. Ch. 424.

² *Doub v. Barnes*, 1 Md. Ch. Dec. 127. See § 52.

³ *Kent v. Ricarda*, 3 Md. Ch. Dec. 392.

⁴ *Coffee v. Newsom*, 8 Geo. 444. See § 52.

⁵ *Ib.*

⁶ *Jackson v. Jones*, 25 Geo. 93; *Wooten v. Smith*, 27 Geo. 216; *Farm-*

ers', &c. v. Ruse, *Ib.* 391; *Lawrence v. Philpot*, *Ib.* 585.

⁷ *Cronise v. Clark*, 4 Md. Ch. Decis. 403.

⁸ *Williams v. Garrison*, 29 Geo. 503.

⁹ *Buckner v. Bierne*, 9 S. & M. 304.

¹⁰ *Little v. Marsh*, 2 Ired. Eq. 18; *Mitter v. Washburn*, 3 Ired. Eq. 161; *Deaver v. Eller*, 7 Ired. Eq. 24.

*responsive to the bill.*¹ So an injunction should not be dissolved if the answer is light, evasive, or uncertain, or if the case made by it does not show clearly that the complainant is not entitled to relief.² And the facts stated in the answer are alone to be taken as true, and not the arguments and inferences made and drawn by the defendant on and from these facts.³ Thus, where the bill alleged that the notes sought to be enjoined were given in consideration that the defendants would procure and make to the plaintiff a fee-simple title to a tract of land, in which they then had only an estate *pur autre vie*, which they denied, and that, in fact, they were unable to procure and make such title, and the plaintiff's allegation was corroborated by the terms of a deed, which they did make; and the defendants answered evasively, insisting upon an unequal and improbable version of the transaction: the court ordered the injunction to be continued to the hearing.⁴ So where an injunction issues to restrain suits at law upon a deed alleged in the bill to be fraudulent, and the answer avers that the defendant has no knowledge of the fraud, and disbelieves the existence of it.⁵

§ 45. It is more especially held, that, on a charge involving *fraud*, either actual or constructive, especially where direct interrogatories are put in relation to particular facts, the court cannot be satisfied with a general answer, or one in any way evasive, as a ground for dissolving an injunction.⁶ Thus an injunction issued on a bill to stay proceedings in an ejectment, charging fraud in the deeds on which the defendants' title rests, will not be dissolved on the coming in of the answer, unless the answer be full and satisfactory upon the merits. Stating the ignorance of the defendants of any fraud, that they believe their title to be good, and that they are *bona fide* purchasers, is not sufficient.⁷ So the answer of a defendant, who knows nothing concerning the transaction charged in the

¹ *Allen v. Pearce*, 6 Jones, Eq. 309; *Rembert v. Brown*, 17 Ala. 667.

² *Ib.*

³ *Chase v. Manhardt*, 1 Bland, 333.

⁴ *Jones v. Edwards*, 4 Jones, Eq. 257.

⁵ *Apthorpe v. Comstock*, Hopk. 143; S. C. 8 Cow. 386.

⁶ *Scull v. Reeves*, 2 Green, Ch. 84.

⁷ *Roberts v. Anderson*, 2 John. Ch.

bill as fraudulent, denying the fraud, is not such a denial as will authorize the dissolution of an injunction.¹

§ 46. To entitle the defendant to a dissolution, an answer to the several charges of the bill, *literally*, is not sufficient; it must traverse *the substance* of the charges.² A mere formal or technical denial is not, as of course, sufficient.³ (a) Where the equity of a bill is denied in terms, but at the same time circumstances are shown which raise strong equities for the complainant, it lies in the option of the court to dissolve or continue an injunction.⁴ So the denial, on the other hand, must be *specific*. Thus where a judgment on a covenant to pay certain costs was enjoined, the complainant alleging that no costs had been incurred; held, an answer, alleging that the defendant had expended large sums of money, but not particularizing them, was insufficient to dissolve the injunction.⁵ But where the subject-matter of an injunction was certain actions between the parties for slander and false imprisonment, and the bill alleged insolvency of the defendant; and the defendant answered, admitting pendency of the suits, but denying, generally, that he was guilty of the charges therein, also denying his insolvency, and alleging an assignment of one half of his judgment before the injunction bill was filed: on exception to the answer, held, a denial of the particular facts alleged was not necessary, but a general denial, that the defendant was not guilty, was sufficient.⁶

§ 47. A filed a bill in chancery, to enjoin a judgment at law in favor of B, on the ground of newly discovered evidence. The bill stated, that A could fully prove the payment of the debt on which the judgment was founded, by several

¹ Ward v. Van Bokkelen, 1 Paige, 100.

Carter v. Bennett, Ib. 214; Linton v. Denham, Ib. 533.

² Everly v. Rice, 3 Green, Ch. 553.

³ Tooley v. Jasper, 2 Hay. 383.

⁴ Horner v. Jobs, 2 Beal. 19; Brown v. Fuller, Ib. 271.

⁵ Parkinson v. Trousdale, 3 Scam. 367.

⁶ Allen v. Hawley, 6 Florida, 142;

(a) Where an injunction against breaking ground for a railroad covered a few feet each side of the plaintiff's land; held, as the soil might otherwise have crumbled from too near an excavation, and the error was not material, the injunction should not be dissolved for this cause. People v. Law, 34 Barb. 494.

witnesses, whose names were inserted in the bill, which was verified by positive affidavit, and the injunction was granted. B stated in his answer, that A filed an affidavit, for the continuance of the suit at law, on account of the absence of two of his witnesses (other than those named in the bill), and denied the diligence set forth, as the evidence of said two witnesses was not brought before the court, though B offered to take their testimony, without notice. B, on the bill and answer, moved the court to dissolve the injunction, and dismiss the bill, which was done. Held, that the word "as," in B's denial, was a qualified one, and did not authorize the motion to dissolve.¹ So an injunction to restrain a trespass to land will not be dissolved, where the answer merely questions the title of the complainant.² So where husband and wife, claiming under a marriage settlement, joined with the trustee in a bill of injunction, to restrain creditors of the husband from selling property conveyed by the marriage settlement, which, on its face, and by the oaths of the complainants, including the trustee, who did not appear to have any interest in the property, appeared to have been executed before the marriage, and was recorded on the acknowledgment of the parties without having been attested; and the defendants in their answer did not allege that the deed was ante-dated, but only that it was acknowledged after the marriage: held, the injunction ought not to be dissolved.³

§ 48. If the whole equity of the bill is denied, the injunction may be dissolved, though the answer contain other matters which are scandalous or impertinent.⁴

§ 49. An injunction granted upon a mere *bill of discovery*, in aid of a defence at law, will be dissolved of course as soon as the answer is perfected, whether the charges in the bill are admitted or denied.⁵

§ 50. On a motion to dissolve an injunction, before the plaintiff has had an opportunity to examine his witness, every alle-

¹ Thompson v. Adams, 2 Cart. 151.

² Moore v. Ferrell, 1 Kelly, 7.

³ Scott v. Loraine, 6 Munf. 117.

⁴ Livingston v. Livingston, 4 Paige, 111.

⁵ King v. Clark, 3 Paige, 76.

gation positively sworn to in the bill, which is not substantially denied in the answer upon the defendant's own knowledge, must be taken as true.¹ So, if the answer neither admits nor denies the allegations of the bill, they are to be taken as true;² if the defendant might have answered directly.³

§ 51. Where the answer admits that there remains a dispute between the parties, the injunction will be continued until the final hearing.⁴ So where an injunction had been obtained against a trustee, forbidding him to sell slaves, which were part of the trust fund, on the allegation that the purposes of the trust had been fulfilled; and on the coming in of the answer it was left doubtful whether the allegation was true.⁵ So the answer to a bill for specific performance and to enjoin a trespass admitted the trespass, and, in words, denied the agreement set out in the bill. It admitted, however, the facts, in part, which made up the agreement, and the facts, in part, which showed that it was entered into. Upon a motion to dissolve upon the coming in of the answer, it was held that enough was admitted to retain the injunction.⁶ But an injunction upon executions, obtained upon notes given for the consideration of a contract charged in the bill of the complainants to be by fraud or mistake for too large a sum, cannot be sustained, if the answer, denying fraud, admits the mistake, and avers that the overcharge has been credited upon the executions.⁷

§ 52. As has been already intimated, an injunction granted upon a bill which contains equity on its face and is positively sworn to by the plaintiff, as being based on matters within his own knowledge, will not be dissolved upon a denial by the defendant on his *information and belief*, such matters not being within his personal knowledge.⁸ Especially if the dis-

¹ Grimstone v. Carter, 3 Paige, 421.

² Young v. Grundy, 6 Cranch, 51;

³ Ired. Ch. 153; Randolph v. Randolph,

⁴ 6 Rand. 194; Wilson v. Hendricks, 1 Jones, Eq. 295.

⁵ Parks v. Spurgin, 3 Ired. Ch. 153.

⁶ Chase v. Manhardt, 1 Bland, 333.

⁷ McNeely v. Steele, 1 Busb. Eq. 240.

⁸ The Justices, &c. v. The Griffin, &c., 11 Geo. 246.

⁷ Rodahan v. Driver, 23 Geo. 352.

⁸ Norton v. Woods, 5 Paige, 249; Everly v. Rice, 3 Green, Ch. 553; Nelson v. Robinson, 1 Hemp. 464. See § 43.

solution might work irremediable mischief.¹ Thus the denial of facts positively charged, and constituting a strong equity, by an executor, who answers on information and belief only, and whose representative character in most cases shows that he can have no knowledge, will not entitle him to a dissolution.² Nor a mere denial, in an answer by an administrator, of his personal knowledge of a transaction between his intestate and a complainant.³ So where to a bill for an injunction, which did not charge that the matters stated in the bill were within the knowledge of the defendant, the defendant answered, denying all knowledge or belief as to the principal facts stated; held, the injunction could not be discharged.⁴ And where a bill for an injunction is not properly verified by affidavits, and its allegations are denied by the answer on information and belief only; the injunction should not be unconditionally dissolved, but the chancellor should direct that the complainant, or some one acquainted with the facts, verify the bill within a reasonable time, and in default thereof that the injunction be dissolved.⁵

§ 53. There are, however, exceptions to this general rule. Thus, contrary to the cases already cited, an answer by an executor or administrator, stating facts "as he is informed and verily believes," is held sufficient for a dissolution.⁶ So where an administrator answers, that he is ignorant of the facts charged, but has understood and believes that they are altogether different, and his answer is confirmed by several statements in the bill.⁷ So on a bill brought by A, for specific performance of an alleged agreement by B for a sale of land to A, an injunction was issued to restrain C, a subsequent purchaser, from proceeding in an action to recover possession from A. The answer of B denied such agreement, and the answer of C denied any knowledge, information, or belief thereof. The injunction was dissolved.⁸ So where the allegations of the bill are made upon information and belief, an

¹ *Holmes v. George*, 24 Geo. 636.

² *Powell v. Brown*, 22 Geo. 275.

³ *Williams v. Stevens*, 1 Halst. Ch. 119.

⁴ *Rodgers v. Rodgers*, 1 Paige, 426. 20.

⁵ *Calhoun v. Cozens*, 3 Ala. 498.

⁶ *Coale v. Chase*, 1 Bland, 136.

⁷ *Clayton v. Lyle*, 2 Jones, Eq. 188.

⁸ *Rockwell v. Lawrence*, 1 Halst. Ch.

injunction granted thereon will be dissolved, if they are denied by the answer in the same manner; especially if it does not appear that the complainant enjoyed superior means of acquiring information.¹

§ 54. It is not error to refuse to dissolve an injunction, when the insolvency of a party, on which the equity of the case largely depends, is charged positively upon knowledge and belief in the bill, and positively denied in the answer.²

§ 55. In conformity with the rule already referred to, that, upon a motion to dissolve, the defendant can rely only upon so much of the answer as is *responsive to the bill* (see § 39); an injunction will not be dissolved, except in special cases, on an answer admitting the equity of the bill, and setting up *new matter* as a defence;³ if denied by a reply;⁴ and until sustained by proof.⁵ Nor where the equity of the bill is admitted or not denied, but a new equity is introduced to rebut it.⁶ *Matter in avoidance* is not evidence on a motion to dissolve an injunction on bill and answer.⁷ Though the answer sets up a complete defence to the bill, but fails to deny the allegations on which the injunction was granted.⁸ If replied to, the defendant in the trial is as much bound to establish the allegations, so made, by independent testimony, as the complainant is to sustain his bill.⁹

§ 56. The statute of limitations set up in an answer is not sufficient ground for dissolving the injunction.¹⁰ Nor the plea of limitations, though insisted upon in the answer.¹¹

¹ Hogan v. Branch, &c., 10 Ala. 485.

² Powell v. Brown, 22 Geo. 275.

³ State v. Northern, &c., 18 Md. 193; Atty., &c. v. Oakland, &c., Walk. Ch. 90; Wilson v. Mace, 2 Jones, Eq. 5; Drury v. Roberts, 2 Md. Ch. Dec. 157; Morris, &c. v. Jersey, &c., 1 Beasl. 227; Green v. Pallas, Ib. 267; Wooten v. Smith, 27 Geo. 216; Cornelius v. Post, 1 Stockt. 169; M'Namara v. Irwin, 2 Dev. & Bat. Ch. 13; Kerns v. Chambers, 3 Ired. Ch. 576.

⁴ Moss v. Pettingill, 3 Min. 217.

⁵ Carson v. Coleman, 3 Stockt. 106; Brewster v. Newark, ib. 114.

⁶ Lyerly v. Wheeler, 3 Ired. Ch. 170; Nelson v. Owen, 3 Ired. Ch. 175;

Hutchins v. Hope, 12 Gill & J. 244; 3 Bland, 125; Yonge v. McCormick, 6 Flori. 368; Wilson v. Mace, 2 Jones, Eq. 5; Strong v. Menzies, 6 Ired. Eq. 544; Cornelius v. Post, 1 Stockt. 196; M'Namara v. Irwin, 2 Dev. & Bat. Ch. 13; Kerns v. Chambers, 3 Ired. Ch. 576.

⁷ Ferriday v. Selcer, 1 Freem. Ch. 258; Hutchins v. Hope, 12 Gill & J. 244; Bellona, &c., 8 Bland, 442.

⁸ Salmon v. Clagett, 3 Bland, 125.

⁹ Lewis v. Leak, 9 Geo. 95.

¹⁰ Hutchins v. Hope, 12 Gill & J. 244.

¹¹ White v. Flannigain, 1 Md. 525.

§ 57. But, it is said, in regard to new matter, introduced by a defendant in his answer to a bill for an injunction, there seems to be this distinction. Where the bill charges the receipt of money, and a general accountability, and the answer admits the receipt, and seeks to account for the money by alleging its application to some particular purpose, the injunction will not be dissolved. But when the bill charges a payment on a particular account, and the answer denies that any payment was made on that account, and accompanies the denial with an admission that a certain sum was received, as a payment on some other account, the injunction will be dissolved; for there is no confession and avoidance by new matter, but a positive denial of the allegation, together with an explanation of a circumstance, relied on to give color to the allegation.¹ And where every material allegation of the bill is denied, and its whole equity negatived, it may be dissolved before the coming in of proof, although the answer contains new matter in addition to the denial.² (a)

§ 58. An injunction may be dissolved on bill and answer, though a *replication* has been filed. But if proofs have been taken, the court will not investigate the merits, unless there are particular reasons against any delay.³

§ 59. In determining whether an injunction was properly dissolved, impertinent matter, which, if stricken out, would not affect the merits, cannot be considered.⁴

§ 60. The dissolution of a temporary injunction is not a decision upon the merits, and will not preclude a final hearing upon the bill and a perpetual injunction.⁵ The bill should not be dismissed,⁶ the cause not having been set down for hear-

¹ Deaver v. Erwin, 7 Ired. Eq. 250.

² Shricker v. Field, 9 Iowa, 366.

³ Grandin v. Le Roy, 2 Paige, 509.

⁴ Barney v. Earle, 13 Ala. 106.

⁵ Barnes v. Racine, 4 Wis. 454;

Thompson v. Adams, 2 Cart. 151;

Allen v. Smitherman, 6 Ired. Eq. 341.

⁶ Beams v. Denham, 2 Scam. 58;

Walters v. Fredericks, 11 Iowa, 181.

(a) Pending a motion, with reasonable notice, for production of documents mentioned in a schedule to the answer, a motion to dissolve will not be heard. Stoker v. Jackson, 12 Sim. (35 Eng. Cha.) 503.

ing;¹ unless the counsel consent that the whole case shall be considered.² The complainant has the right to continue it as an original bill and to proceed to a final hearing of the cause.³ Thus it is error to dismiss a petition asking an injunction, and containing a prayer for general relief, on the dissolution of the injunction, if it contain averments sufficient to maintain an action of trespass to try title.⁴ So when the allegations of the bill do not warrant an injunction, the injunction may properly be dissolved, and the bill retained for other relief.⁵ So at a hearing in chambers, on a motion to dissolve an injunction, it is error for the judge to try the case, and finally dispose of it.⁶ So where, in a bill for injunction and relief, that part is not sworn to, which sets forth the facts justifying such interference; the injunction should be dissolved, but the bill should not be dismissed.⁷ So where a petition, which shows a good cause of action against the plaintiff, and also prays for an injunction restraining the defendant from collecting an execution against him, which is granted, is met by an answer, denying the equities of the petition; it is proper to dissolve the injunction; but, unless the plaintiff rests his cause upon the evidence contained in the answer, it is error to dismiss the petition.⁸ So if an injunction be granted in vacation on a valid bill, and it be shown to the court, at the next term, that the injunction had been irregularly granted; the injunction may be dissolved, but the bill should not be dismissed.⁹

§ 60 a. A decree dissolving an injunction, except as to a particular piece of property, as to which it is to stand until judgment in a pending suit at law, is not a final judgment, nor a dissolution of an injunction as to one of two defendants, severally interested, though the decree is also for costs.¹⁰

§ 61. A bill remains in court, after dissolution of the injunction, of course, and without motion.¹¹

¹ *Dorsey v. Hagerstown Bank*, 17 Md. 408.

² *Goodrich v. Moore*, 2 Min. 61.

³ *Blow v. Taylor*, 4 Hen. & M. 159; *Johnson v. Alexander*, 1 Eng. 302.

⁴ *Burnley v. Cook*, 13 Tex. 586.

⁵ *Norris v. Norris*, 27 Ala. 519; *Harrison v. McCrary*, 1 Ala. (S. C.) 619.

⁶ *Henderson v. Marcell*, 1 Kans. 137.

⁷ *Porter v. Moffett*, 1 Morris, 108.

⁸ *Fulgham v. Chevallier*, 10 Tex. 518.

⁹ *Gray v. Baldwin*, 8 Blackf. 164.

¹⁰ *Green v. Banks*, 24 Tex. 522.

¹¹ *Cole v. Sands*, 1 Overton, 183.

§ 62. Where the principles of a cause are adjudicated, in an order rejecting a motion to dissolve an injunction; the cause may be continued to the hearing; or, if an appeal has been allowed, it may be dismissed, as having been prematurely allowed.¹

§ 63. A bill in chancery for an injunction, &c., was filed, and the writ issued in vacation. It did not appear from the record that the summons was ever served, or returned into court. One of the defendants appeared, and filed his answer, to which there was no replication. A bond for costs was filed, and the case continued to the next term, but no steps were taken to bring the other defendant into court. At the second term, the case was called in its order; the defendant again appearing, and no one appearing for the complainant, the bill was dismissed, and the injunction dissolved, for want of prosecution, but without prejudice. Held, that the dismissal of the bill and the dissolution of the injunction were proper.²

§ 64. A preliminary injunction to restrain an alleged trespass was dissolved at the hearing. Held, on appeal, that this amounted to a nonsuit, and was not a bar to other proceedings.³

§ 64 a. A dismissal of an injunction bill, on the final hearing, is a determination that the party was not entitled to an injunction.⁴ (a)

§ 65. The dismissal of a suit for want of prosecution amounts to a determination, that a temporary injunction, issued

¹ *Baltimore, &c. v. Wheeling*, 13 Gratt. 40.

² *Duncan v. Finch*, 5 Gilm. 295.

³ *Zugenbuhler v. Gilliam*, 3 Clarke, 391.

⁴ *Loomis v. Brown*, 16 Barb. 325.

(a) Before a bill can be dismissed, in Illinois, there must be an issue made up as prescribed by the statute; and, to justify a hearing upon bill and answer, it must appear that the complainant has not filed his replication within the time prescribed. *Beams v. Denham*, 2 Scam. 58. The third section of the Virginia statute of 1804, concerning proceedings in chancery, which provides for the dismissal of a bill on dissolving an injunction, does not apply to bills for injunction

in the course of it, was improperly granted, and the same is thereby set aside and discharged.¹

§ 66. A having obtained a judgment at law against B, B obtained an injunction, which was subsequently dissolved, and the bill dismissed. B appealed. A obtained an order of court for an execution. On error, it was held that the appeal suspended the order dissolving the injunction, as well as that dismissing the bill, and that the execution was irregular.²

§ 67. Upon the coming in of the answers to a bill for discovery, the injunction granted upon the filing of the bill having been dissolved, it is practically an end of the suit. It is erroneous to continue the bill for discovery, or to allow a supplemental and amendatory bill.³ So where a perpetual injunction is the only proper relief, on dissolving the injunction the bill should be dismissed.⁴ So a dissolution of the injunction by order of the court, upon a hearing, though on motion, followed by a discontinuance of the action by the plaintiff, makes the order of dissolution a final decision in such sense, that it cannot be reviewed on appeal, nor re-investigated in that action.⁵

§ 68. The answer may entitle the defendant to a *partial* dissolution of the injunction. Thus it is erroneous to dissolve an injunction for more than the amount claimed in the answer.⁶ So where a temporary injunction has been granted upon a judgment at law, and upon further proceedings the defendant appears entitled to a sum less than the amount of such judg-

¹ Dowling v. Polack, 18 Cal. 625.

² Yocom v. Moore, 4 Bibb, 221.

³ Yates v. Monroe, 13 Ill. 212.

⁴ Edwards v. Pope, 3 Scam. 465.

⁵ Carpenter v. Wright, 4 Bosw. 655.

⁶ Vandyke v. Hardin, 6 J. J. Marsh. 122.

and other and further specific relief. Hough v. Shreeve, 4 Munf. 490. In North Carolina, where a preliminary injunction has been dissolved upon the coming in of the answer, the bill will be dismissed for want of prosecution, if the plaintiff takes no step in the suit for two terms after the dissolution of the injunction. Avery v. Brunce, 1 Hay. 369. But not in case of an application, for a *dedimus* to take evidence, by the complainant, after a dissolution of the injunction. Dawson v. ———, 2 Hay. 296.

ment, the injunction should be dissolved as to that amount and perpetuated as to the residue.¹ And where enough of the bill remains unanswered to raise a probability of the plaintiff's sustaining his claim, an injunction will not be dissolved before the hearing, if such a dissolution might render a decree for the plaintiff unavailing.²

§ 68 a. Where a plaintiff has an equity to enjoin a part of a judgment, but, for the purpose of obtaining an injunction as to the whole, alleges a ground of relief which is false in fact, and relies upon it alone; a court of equity will dissolve the injunction as to the whole.³

§ 69. We have already (§ 40) referred to the effect of *affidavits*, when accompanying or following a denial by answer. It remains to be stated, as the general rule, that an injunction can be dissolved only on the answer of the defendant. Upon a motion, on the coming in of the answer, to dissolve an injunction, the question must be decided upon the answer, and the exhibits filed and admitted by the answer. Affidavits are not admissible to sustain or oppose the motion.⁴ Thus the *ex parte* affidavit of a person not party to the bill is not sufficient ground.⁵ Nor the affidavit of a person interested, but no party to the suit, without the answer of the defendant.⁶ But the exception is sometimes made, that an injunction will not be dissolved on affidavits, except in cases of waste and partnership.⁷ And, on the other hand, on a motion to dissolve an injunction of a special nature, as to stay waste and the like, where the injury would be irreparable, the bill will be read as an affidavit to contradict the answer.⁸ So where the plaintiff, by bill sworn to, applies for an injunction against removing property, and the defendant makes an insufficient answer, the court will allow the bill of the plaintiff to be read as an affi-

¹ Lyles v. Hatton, 6 Gill & J. 122; Pillow v. Thompson, 20 Tex. 206.

² Sherill v. Harrell, 1 Ired. Ch. 194.

³ Ward v. Smith, 5 Jones, Eq. 204.

⁴ Moore v. Reed, 1 Ired. Ch. 418; Thompson v. Allen, 2 Hay. 150; Bel-lona, &c., 8 Bland, 442.

⁵ Christmas v. Campbell, 1 Hay. 123.

⁶ Thompson v. Allen, 2 Hay. 150.

⁷ Sackett v. Hill, 2 Mich. 182.

⁸ Lloyd v. Heath, 1 Busb. Eq. 39.

davit, and if, on the whole case, the matter is left in doubt, the injunction will be continued until the hearing.¹

§ 70. With regard to the nature, weight, and legal admissibility of testimony upon applications of this nature, it is held, that an injunction will not be dissolved, as a matter of course, on the coming in of the answer denying the equity of the bill, if the complainant has adduced auxiliary evidence of his right.² And, on the other hand, that, on a motion to dissolve an injunction, the defendant ought not to be required to invalidate, by full proof, the allegations of the bill; the burden is on the plaintiff to support them; and the defendant is required only to show that the evidence on which the injunction was granted is not entitled to credit.³ It is not expected that a party shall come as fully prepared with proofs as he might do on a final hearing.⁴ The bill can only be read as an affidavit.⁵

§ 70 a. A party, showing cause against dissolution of an injunction upon answer, is bound by the answer, and cannot by affidavits prove allegations of fact in the bill, which the answer neither admits nor denies.⁶

§ 70 b. Where an injunction is obtained on affidavits, affidavits may be used on a motion to dissolve, although a demurrer would briefly determine the point in issue.⁷

§ 71. *Depositions* are sometimes offered as evidence. And where depositions were taken under an order of a county court in Maryland, to be used on the hearing of such motion, and the case was removed to the chancery court, the chancellor refused to exclude them on the hearing.⁸

§ 72. We have already spoken of the insufficiency of affidavits, without an answer of the defendant. Affidavits, how-

¹ *Wilson v. Mace*, 2 Jones, Eq. 5.

² *Orr v. Littlefield*, 1 W. & M. 13.

³ *North v. Perrow*, 4 Rand. 1.

⁴ *Bibb v. Prather*, Kentuck. Decis. 158.

⁵ *Airs v. Billops*, 4 Jones, Eq. 17.

⁶ *Castellain v. Blumenthal*, 12 Sim. (35 Eng. Cha.) 42.

⁷ *Barnsby, &c. v. Twibell*, 7 Beav. (29 Eng. Cha.) 31.

⁸ *Bellona, &c.*, 8 Bland, 442.

ever, are often admitted in evidence. (a) Thus an affidavit is admissible, which goes to show that the injunction was irregularly issued, or that the officer allowing it was misled, and induced to grant it contrary to law.¹ And on the other hand, where a special injunction has been obtained on affidavits, and, on the answer coming in, the defendant moves to dissolve; such affidavits may be used against the answer.²

§ 73. Where an injunction is prayed for to prevent irreparable injury, and the case, as it appears on the bill, is a proper one for the interference of the court; if any of the material facts are denied in the answer, the court will not dissolve the injunction upon the bill and answer alone, but hold it over until proofs are taken, or the matters in dispute, if questions at law, are decided by a court of law.³

§ 74. The distinction is made, that affidavits taken by the complainant in a bill for an injunction, before the coming in of the answer, may be read in support of the allegations of the bill, on a motion to dissolve the injunction; but affidavits filed after the coming in of the answer cannot be read.⁴ The general rule is, however, that, upon a motion to dissolve an injunction upon the coming in of the answer, the plaintiff cannot, except in a few cases, introduce affidavits to contradict the answer.⁵ The exceptions are held to be in the case of an injunction to stay waste;⁶ or where, in case of a dissolution

¹ *Carroll v. Farmers', &c.*, Harring. Ch. 197.

² *Custance v. Cunningham*, 17 Eng. L. & Eq. 501.

³ *Purnell v. Daniel*, 8 Ired. Eq. 9.

⁴ *Kinsler v. Clarke*, 2 Hill, Ch. 617.

⁵ *Gentry v. Hamilton*, 3 Ired. Ch. 376.

⁶ *Long v. Brown*, 4 Ala. 622. See *West v. Coke*, 1 Mur. 191; *Merwin v. Smith*, 1 Green, Ch. 182.

(a) In New York, where a preliminary injunction is granted absolutely in the first instance, and the defendant seeks a dissolution thereof upon the ground that the whole equity of the bill is denied by the answer, it is not the practice to allow him to read affidavits in support of the answer, except where the answer is not conclusive under the 27th rule. *Village, &c. v. Matthews*, 9 Paige, 504.

But where the plaintiff is directed to give notice of his application for an injunction, or the defendant is required to show cause why the injunction should not be granted, whether a temporary injunction is allowed or not in the mean time, the defendant may produce his own affidavit, or those of any other persons, to show that the injunction should not be granted. *Ib.*

of the injunction, the parties will not remain *in statu quo* at the hearing ;¹ or where irreparable mischief would ensue on the dissolution of the injunction.² In New York, where the defendant moves to dissolve an injunction, upon the answer and the affidavits attached thereto, the plaintiff may oppose the motion by affidavits other than those attached to the complaint on which the injunction was granted.³

§ 75. Where new matter is contained in the answer, not responsive to the bill, which is relied upon in any way as a foundation for setting aside the injunction, the complainant may read affidavits in contradiction of the new matter.⁴

§ 75 a. Where a bill was filed for an injunction, an injunction issued, and an answer on oath waived, but answer was made and affidavits were read in its support, and a conflict of evidence produced, the injunction was not dissolved as of course, but was retained until a full hearing.⁵

§ 76. Where the plaintiff relies upon the affidavits of third persons, annexed to the bill, to sustain an injunction, in opposition to an answer under oath, though the oath has been waived by the plaintiff, the defendant will be permitted to read the affidavits of third persons, in support of his answer.⁶

§ 77. In New York, on motion to dissolve an injunction, the defendant may introduce evidence, in support of his answer, to rebut the affidavits annexed to the bill under the rule (37).⁷

§ 78. There are various miscellaneous points of *practice* connected with the dissolving of injunctions.(a)

§ 79. Among these is the question of *amendment*.

¹ *Davis v. Fulton*, 1 Overton, 121.

⁴ *Merwin v. Smith*, 1 Green, Ch. 182.

² *Moredock v. Williams*, 1 Overton, 325 ; *Swindall v. Bradley*, 3 Jones, Eq. 667.

⁵ *Mead v. Richards*, 4 Edw. Ch. 667.

³ *Hascall v. The Madison, &c.*, 8 Barb. 174.

⁶ *Haight v. Case*, 4 Paige, 525.

⁷ *Brown v. Haff*, 5 Paige, 235.

(a) As to costs, see *Cyrus v. Hicks*, 20 Tex. 483.

§ 80. After an injunction has been dissolved on the merits, the complainant may amend, and obtain an injunction on the amended bill.¹

§ 81. A cross bill, formal in other respects, but which omits the prayer, that it be allowed as such, and heard with the original bill, is amendable, and on application to the chancellor, in vacation, to dissolve the injunction, should be regarded by him, *pro hac vice*, as amended. Such bills are treated with greater indulgence than original bills.²

§ 82. Where a defendant moves to dissolve an injunction, and the motion is refused, and afterwards, by permission, he amends his answer, he is at liberty again to move the dissolution.³

§ 83. If an amendment to a bill presents no new case, and changes no equities, the defendant may move a dissolution of an injunction, without answering such amendment.⁴

§ 84. If the original bill, on which an injunction was granted, be sworn to, the addition of an unsworn amendment, not needed to continue the injunction, is no cause for a dissolution.⁵

§ 84 a. An injunction, till answer or further order, is defeated by the amendment of adding a co-plaintiff, it being the effect of such amendment to make the answer impossible.⁶

§ 84 b. In case of injunction, a motion to dissolve, and an amendment, the motion was overruled.⁷

§ 85. In case of *appeal* from a verdict for the defendant in an equity cause, a final verdict only dissolves a previous injunction.⁸ (See § 15.)

¹ Buckley v. Corse, Saxton, 504; Arnold v. Kreissler, 22 Tex. 580.

² Nelson v. Dunn, 15 Ala. 501.

³ Edney v. Motz, 5 Ired. Eq. 233; Thomas v. Horn, 21 Geo. 177.

⁴ Mahone v. Central Bank, 17 Geo. 111.

⁵ Maddox v. Rowe, 28 Geo. 61.

⁶ Atty. &c. v. Marsh, 16 Sim. (39 Eng. Cha.) 572.

⁷ Crawford v. Paine, 19 Iowa, 172.

⁸ Neisler v. Smith, 2 Kelly, 265. See White v. Cazenave, 14 La. An. 57; Albright v. Mallory, 19 Tex. 106.

§ 85 a. The plaintiffs being about to appeal from an order dissolving an injunction, the judge below ordered that, upon filing a satisfactory appeal-bond, the injunction should be continued. The appeal was perfected, and the plaintiff applied in the supreme court for a further injunction, alleging that the defendant disregarded the order of the court below. Held, the plaintiff was sufficiently protected by the order of the court below, and the application was refused.¹

§ 86. It is a sufficient answer to an application to dissolve an injunction, that the equity of the bill on which the injunction rests is not denied by the answer, although no *exceptions* have been filed.² And, on the hearing of a motion to dissolve, objections of every kind to the answer may be made, and are then in order.³

§ 87. On motion to dissolve an injunction upon answer, exceptions filed are no objection to the motion, unless they affect the answer in points relating to the grounds of the injunction.⁴ (a)

§ 88. Nothing in answer to a bill of discovery can be deemed impertinent, which tends to disprove the existence of such defence as is stated in the bill; and to entitle the com-

¹ Eldridge v. Wright, 15 Cal. 88.

² Wakeman v. Gillespy, 5 Paige, 112. See Scotson v. Gaury, 1 Hare (23 Eng. Ch.) 99.

³ Gibson v. Tilton, 1 Bland, 352.

⁴ Lewis v. Leak, 9 Geo. 95; Smith v. Thomas, 2 Dev. & B. Ch. 126; Baine v. Earle, 13 Ala. 106; Wyckoff v. Cockran, 3 Green, Ch. 420; Doe v. Roe, Hopk. 276.

(a) In New York, an order by an injunction master, or vice-chancellor, at chambers, under Rule 125, allowing the plaintiff further time to except, does not enlarge the time within which exceptions must be filed to prevent the dissolution of an injunction, upon bill and answer. Wakeman v. Gillespy, 5 Paige, 112. Where an answer has been excepted to for insufficiency within the time prescribed by the rules of court, the defendant cannot move to dissolve the preliminary injunction, on bill and answer, until the time for procuring the master's report has expired. Parker v. Williams, 4 Paige, 439. An application to dissolve an injunction, and to discharge a *ne exeat*, upon bill and answer, cannot be heard until the expiration of the time (10 days) allowed the plaintiff to except. Satterlee v. Barge, 3 Paige, 142. In North Carolina, contrary to the English practice, where exceptions are filed to an answer to an injunction bill, the exceptions and the motion to dissolve the injunction will be heard together. Edney v. Motz, 5 Ired. Eq. 233.

plainant to retain his injunction until his exceptions are disposed of, he must show some actual injury from the alleged impertinent matter.¹

§ 88 a. A special injunction may be dissolved, notwithstanding exceptions to the answer for impertinence.²

§ 89. On a motion to dissolve an injunction after answer, the court will not examine exceptions, as to their merits, further than to ascertain that they are not frivolous.³ Where one of several creditors, secured in a deed of trust, filed a bill to enforce his debt, in which he called on the trustee to set forth the names of the other creditors, and the amounts due them, and the general state of the fund, and the answer failed to make such discovery, whereupon the plaintiff excepted to the answer, and the exceptions were allowed; held, an injunction obtained, to prevent removal of the funds, would be continued until a full answer, and then disposed of according to the equity confessed in the answers.⁴

§ 89 a. Where on a motion to dissolve the parties actually appear, and do not object the insufficiency of *notice*, the objection is waived.⁵

§ 90. *Laches*, neglect or delay will be ground for the dissolving of an injunction.⁶ Thus, under peculiar circumstances, and after a lapse of sixteen years, an injunction to stay proceedings at law will be dissolved, irrespective of the merits of the questions at issue.⁷ So, in a patent case, a temporary injunction will be dissolved at the next term, if the law case, directed by the court to try the validity of the complainant's patent, is not brought before that time.⁸ So an agreement was made, and a large part of the property embraced in it was conveyed: Three years afterwards, the

¹ *Jemett v. Belden*, 11 Paige, 608; *Doe v. Roe*, Hopk. 276.

² *Simeon v. Davis*, 12 Sim. (35 Eng. Cha.) 46.

³ Hopk. 276.

⁴ *Symons v. Reid*, 5 Jones, Eq. 327.

⁵ *Penrice v. Wallis*, 37 Miss. 172.

⁶ See *Stokes v. Wilson*, 12 Sim. (35 Eng. Cha.) 91; *Hightour v. Rush*, 2 Hay. 361.

⁷ *Hunt v. Smith*, 3 Rich. Eq. 465.

⁸ *Woodworth v. Edwards*, 3 W. & M. 120.

vendees filed a bill for a conveyance of the rest, and a year after that the vendor prayed for an injunction to restrain the vendees from conveying, on the ground that the agreement was obtained by fraud, which it appeared he knew of at the time. The answer denied the equity of the vendor's bill. Held, the vendor was guilty of great laches, and so the injunction was dissolved with costs to the respondent.¹ So an injunction will be dissolved on motion, if a copy of the bill on which it was obtained is not served upon the defendant within a reasonable time after his appearance.² On the other hand, delay may prevent the dissolving of an injunction. The court will not dissolve an injunction on enforcement of an important right, unless the party enjoined use due diligence in getting the question before the court.³

§ 90 a. The neglect of the plaintiff, on serving an injunction, to serve a *subpoena* to appear and answer on some of the defendants, is no ground for an application, by a defendant on whom the *subpoena* has been served, to dissolve the injunction.⁴ (a) And the rule of dissolving does not apply, where process is regularly sued out, but irregularly served, and the complainant uses due diligence in suing out new process.⁵

§ 91. Where a plaintiff, upon obtaining an injunction, neglected to serve that and the *subpoena* upon one of the defendants, such defendant may nevertheless enter an appearance, and join with the other in an application to dissolve the injunction.⁶

§ 92. An injunction may be dissolved, though all the defendants, who could and ought to answer, have not done so, if the plaintiff does not proceed in his cause with reasonable

¹ *Trustees, &c. v. Gilbert*, 1 Beasl. 78.

² *Ferguson v. Robinson*, Hopk. 8.

³ *Baird v. Moses*, 21 Geo. 249.

⁴ *Seebor v. Hess*, 5 Paige, 85.

⁵ *Payne v. Cowan*, 1 S. & M. Ch. 26.

⁶ *Waffle v. Vanderheyden*, 8 Paige, 45.

(a) In Kentucky, upon an injunction being dissolved, and the bill continued as an original, if the complainant neglects to take out commissions or *subpoena* witnesses, the suit is discontinued at the second term after the injunction is dissolved. *Bizzel v. Binke*, Mar. 61.

diligence. As where an injunction had been granted to stay a suit at law, and some of the defendants had answered, but the plaintiff had neglected for nine months to take any steps to compel the others to appear and answer, or to have the bill taken *pro confesso* against them. Or if the *subpœna* is not served and returned at the term to which it is made returnable, or at least an attempt made to have it served; and this although the suit is against the sheriff, and there is no coroner in the county. In such case it may be served by any one; though the return must be made under oath, and rule taken upon the defendant to answer, &c.¹

§ 93. But where the situation of the cause is such that the plaintiff cannot proceed in it, delay is no cause for dissolving an injunction.² (a) And an injunction will not be dissolved for laches in prosecution, when the cause has been set down by the opposite party to be heard the next term.³

§ 93 a. Neglect to file, within the proper time, the papers upon which the injunction was issued, does not render the injunction a nullity, or entitle the defendant to have it set aside.⁴

§ 93 b. A motion will not be sustained to dissolve absolutely, not *nisi*, in the first instance, though the time has long passed at which the answer was to be held sufficient.⁵

§ 94. An injunction ought not to be dissolved upon an answer not made *under oath*, and where evidence of the truth of the facts was not furnished.⁶ Though the plaintiff has waived an answer on oath, the answer must still be sworn to in order to dissolve an injunction.⁷ And the defendant may

¹ *Depeyster v. Graves*, 2 John. Ch. 148; *West v. Smith*, 1 Green, Ch. 309; *Hightour v. Rush*, 2 Hay. 361.

² *Schermerhorn v. Merrill*, 1 Barb. 511.

³ *Smith v. Cooper*, 21 Geo. 359.

⁴ *Leffingwell v. Chave*, 5 Bosw. 703.

⁵ *Raincock v. Young*, 16 Sim. (39 Eng. Cha.) 566.

⁶ *Gray v. McCance*, 11 Ill. 325.

⁷ *Dougrey v. Topping*, 4 Paige, 94.

(a) An injunction will not be dissolved, because it was obtained more than five months after the judgment enjoined was rendered. *Pugh v. Maer*, 4 Hawks, 362.

answer under oath for that purpose, with the same effect as in case of other sworn answers.¹ If the plaintiff waives an answer on oath from all the defendants, and one of them answers on oath, denying the whole equity of the bill; he may move to dissolve the injunction upon his answer, though the other has put in an answer not under oath.²

§ 95. An injunction should not be dissolved for the reason that the bill was not sworn to, where the effect of the dissolution would be to put the property out of the power of the court.³

§ 96. A motion to dissolve an injunction may be taken and disposed of at any time before the cause is regularly reached on the docket, or called for trial,⁴ more especially after answer.⁵ And, if a bill is wanting in equity, the chancellor may dissolve the injunction in vacation, after the coming in of the answer, notwithstanding all its allegations are therein admitted.⁶ A party moving to dissolve an injunction in vacation need not wait to file his answer in court, or at the rules, but may put in his answer and have the benefit of it at the hearing of the motion.⁷ (a)

§ 97. It is error to *perpetuate* an injunction against a party without having him before the court.⁸ And upon a motion to dissolve an injunction, upon the coming in of the answer, it is not proper to decree that the injunction be made perpetual, in whole or in part.⁹ So an injunction will only be perpetuated as issued for some legal cause stated in the petition.¹⁰

¹ Manchester v. Dey, 6 Paige, 295.

² Schermerhorn v. Merrill, 1 Barb. 511.

³ Schermerhorn v. L'Espenasse, 2 Dal. 360.

⁴ Huston v. Berry, 3 Tex. 235.

⁵ Deklyn v. Davis, Hopk. 135.

⁶ Nelson v. Dunn, 15 Ala. 501.

⁷ Goddin v. Vaughn, 14 Gratt. 102.

⁸ Chapman v. Harrison, 4 Rand. 386.

⁹ McReynolds v. Harshaw, 2 Ired. Ch. 29.

¹⁰ Pitman v. Robicheau, 14 La. An. 108.

(a) Under the statute of Alabama, authorizing a motion to dissolve an injunction in vacation, upon the coming in of the answer, the chancellor may hear the motion and make the decree at a place out of his division. The course of practice, in appealing from such a decree, is precisely the same as if the decree were made in term time. Griffin v. Branch, &c., 9 Ala. 201.

§ 98. Injunctions are sometimes *revived* after dissolution on the merits. Or awarded afresh on special motion, or new facts stated in an amended or supplemental bill, or on proof taken.¹ A court of chancery is always open to reinstate, as well as to grant, an injunction.² If the dissolution of an injunction be improperly obtained, it will be revived.³ And where an injunction is awarded until the coming in of the answer, though dissolved of course on the answer's being filed, without motion, the plaintiff may move to reinstate it.⁴ (a)

§ 98 a. An injunction having been dissolved by consent, but with a special saving of the right to move for its renewal, a motion to reinstate it is equivalent to an application after bill and answer filed, and places the parties in the same attitude, as to facts to be considered, as upon a motion to dissolve upon the coming in of an answer.⁵

§ 98 b. A special order is necessary to revive an injunction which has been dissolved. The making a writ of error operate as a supersedeas will not have this effect.⁶

§ 99. It is no ground to dissolve an injunction in one State, that an injunction has issued from a court of another, and that the defendant has given security to perform the decree.⁷ (b)

¹ *Tucker v. Carpenter*, Hemp. 440.

² *Radford v. Innes*, 1 Hen. & M. 7.

Billingslea v. Gilbert, 1 Bland, 566.

⁴ *Beal v. Gibson*, 4 Hen. & M. 481.

⁵ *State v. Northern, &c.*, 18 Md. 193.

⁶ *Blount v. Tomlin*, 26 Ill. 531.

⁷ *McKim v. Fulton*, 1 Overton, 238.

(a) In such case, in Virginia, the bill is to be dismissed, unless the injunction be reinstated, or unless cause be shown against it at the term ensuing the coming in of the answer. 4 Hen. & M. 481. After an injunction has been dissolved, a motion to have it reinstated, on new evidence, is in the nature of an original application, and, if refused, the complainant may apply to one of the judges of the Court of Appeals. *Gilliam v. Allen*, 1 Rand. 414. In California, the county court may revive an injunction once dissolved, or grant one previously denied, and to that extent only, when the matter has been once disposed of, does its jurisdiction extend. *Hicks v. Michael*, 15 Cal. 107.

(b) The pendency of a bill in the county court of Virginia, after the dissolution of the injunction, is no bar to the complainant's obtaining another injunction in the Superior Court of Chancery. *Roberts v. Jordans*, 3 Munf. 488.

§ 100. If a party, who has unsuccessfully applied for an injunction, afterwards apply to another court of concurrent jurisdiction, for the same purpose, upon the same grounds, without disclosing his former application, relief may be extended to the other party in a summary way upon his petition; but where the equities of the two applications are different, the temporary injunction should not be dissolved without answer from the defendant, or, at least, notice to the complainant; and where the defendant had neglected to answer for a long time, during which, in the ordinary course of practice, proceedings pending in a court of common law would have been settled, and the matter out of which the proceedings in equity arose determined in favor of one of the parties, it was held an additional reason for refusing to interfere before answer.¹

§ 100 a. Where an injunction against a judgment was dissolved, and another obtained on a new claim, this was also dissolved.² So where an injunction has been dissolved on answer, the court will not hear a motion for renewal on testimony taken afterwards in the case.³ And where an appeal from an order dissolving an injunction has been withdrawn, the propriety of such order cannot be drawn in question, upon a subsequent petition in the same cause, for an injunction or order for the same purpose as the first. So after an order of the vice-chancellor, dissolving an injunction, had been affirmed on appeal to the chancellor, and an appeal taken to the Court of Errors; the vice-chancellor refused an order in effect reviving the injunction, upon proofs merely cumulative in support of the facts in issue upon the dissolution of the injunction, and before the closing of proofs in the cause.⁴ So where an injunction has been voluntarily dissolved by the plaintiff, or the dissolution of it, without his consent, has been ratified by being made the ground of other proceedings, the plaintiff cannot, on petition, renew the injunction, without new and special reasons.⁵ And a regular order dissolving an injunction will

¹ Wood v. Bruce, 9 Gill & J. 215 ; Lowry v. McGee, 5 Yerg. 238.

² Grubbs v. Lipscomb, 1 Bibb, 145.

³ France v. France, 4 Halst. Ch. 619.

⁴ Jewett v. Albany, &c., 1 Clarke (N. Y.), 241 ; Tone v. Brace, 1 Clarke (N. Y.), 503.

⁵ Livingston v. Gibbons, 5 John. Ch. 250.

not be vacated, merely to admit a formal objection to the application to dissolve.¹

§ 101. An injunction will not be dissolved until the equity of a supplemental bill be sworn off.² But where it is granted upon a supplemental bill, growing out of an answer to the original bill, it may be dissolved.³

§ 102. Where the common injunction has been dissolved on the merits in the answer, and the bill is afterwards amended, a like injunction cannot be obtained, as of course, for want of appearance to the amended bill.⁴

§ 103. Where the right to an injunction is apparent upon the answer, a preliminary injunction will not be dissolved, though improvidently issued.⁵

§ 104. An injunction to restrain the defendant from selling under a mortgage was retained, after the grounds on which it was granted were removed, until the decision of an action at law, brought by the plaintiff against the defendant on the covenant of seisin in a deed.⁶

§ 105. It has been already stated, in connection with the subject of *denial* by the answer, that an injunction may be dissolved *in part*. It may be here added, as a general rule of *practice*, that an injunction may be partially dissolved in accordance with the case made out by the answer.⁷ Thus a bill in equity, filed by a surety in a bond to try the right of property, against whom judgment on the bond had been rendered, charged that there had not been a fair trial, and that he could prove that the slaves in dispute had been conveyed away by deed of trust before they were levied on; and an injunction was granted. The answer denied the identity

¹ Champlin v. The Mayor, &c., 3 Paige, 573.

² Rogers v. Solomons, 17 Geo. 598.

³ Parker v. Constable, 13 Sim. (36 Eng. Cha.) 536.

⁴ Zulueta v. Vinent, 7 Eng. Law & Eq. 185.

⁵ Smith v. McLeod, 3 Ired. Ch. 390.

⁶ Tillou v. Sharpsteen, 5 John. Ch. 260.

⁷ Edwards v. Perryman, 18 Geo. 374.

of one of the slaves named in the deed with that levied on, and there was no proof in the case. The injunction was dissolved by the court below, as to that particular slave, and such a decree was affirmed.¹

§ 106. Where a part only of the defendants apply to dissolve an injunction, it can be dissolved as to them only.² And if the plaintiff has used due diligence to obtain the answers, exceptions to the answers of some of the defendants, submitted to, or allowed by the master, are sufficient to defeat a motion to dissolve the injunction.³ A complainant has the right to make every one a party who is a participator in the fraud, for the purpose of discovery; and generally to hold his injunction until he obtains the discovery.⁴ The answers of all the defendants implicated must be perfected before the injunction can be dissolved. So where the defendant, who has been restrained, denies the equity, but the others most interested in the subject-matter admit all the material allegations, the injunction must stand.⁵ So on a bill for an injunction against two, and an answer by one only, that he is ignorant of the facts charged, the injunction will not be dissolved until the answer of the other is put in.⁶ If the answering defendants are unable, from want of knowledge, to deny material allegations of the bill, the injunction is retained, and this although the only defendant who can answer such allegations is absent from the State.⁷ (See § 109.)

§ 107. But a motion to dissolve an injunction may be granted, though one of the defendants has not answered, if his answer would not affect the rights of the party enjoined.⁸ Or, upon the answer of those defendants within whose knowledge the facts charged in the bill must be, if they exist at all,

¹ *Pass v. Dykes*, 8 S. & M. 92.

² *Teller v. Van Deusen*, 3 Paige, 33. See § 32.

³ *Noble v. Wilson*, 1 Paige, 164; *Wisham v. Lippincott*, 1 Stockt. 353; *Stantenberg v. Peck*, 3 Green, Ch. 446; *Jones v. Magill*, 1 Bland, 177; *Cape, &c.*, 3 Ib. 606; *Reynolds v. Mitchell*, Bre. 135.

⁴ *Robinson v. Davis*, 3 Stockt. 302.

⁵ *Robinson v. Davis*, 3 Stockt. 302; *Zabriskie v. Vreeland*, 1 Beasl. 179. See *Macgregor v. Cunningham*, 16 Sim. (39 Eng. Cha.) 365.

⁶ *Councill v. Walton*, 4 Ired. Eq. 155.

⁷ *Lines v. Spear*, 4 Halst. Ch. 154.

⁸ *Wilson v. Hendricks*, 1 Jones, Eq. 295; *Evans v. Lovengood*, 1 Jones, Eq. 298.

although there are others who have not answered.¹ Or, upon the answer of the defendant who alone is interested, denying all the facts and circumstances charged in the bill, upon which its equity is based.² Or, before the answers of merely *nominal* defendants.³ Or, where the defendants have not an identity of interest, and the act of one will not affect the other.⁴ And in general, though an injunction upon parties jointly implicated will not be dissolved, without the answer of the defendant on whom the *gravamen* of the bill rests; it is otherwise, if the defendant who answers is able to lay the facts before the court, which show that the complainant has no equity.⁵ Or, if the plaintiff has not taken the requisite steps to compel an answer from all.⁶ And where the defendants, on whom the *gravamen* rests, have fully answered, they may apply to have the injunction dissolved as to them, although a co-defendant has not answered. Nor is the general rule (§ 106) applicable where the injunction has not been properly granted.⁷ In such cases, the cause will be placed in a situation to obtain a dissolution, without the answer.⁸ More especially will the answer of one be sufficient, where the party not answering is not charged in the bill with any particular knowledge of the facts alleged, and the parties who have answered were so charged.⁹ Or if all have answered, against whom the complainants claim an equity.¹⁰ Or if the defendant, on whom the *gravamen* of the charges is made, has fully answered.¹¹

§ 108. A bill was filed to restrain proceedings at law brought by three of the defendants, and the common injunction was obtained against the three. Two, A and B, answered, and obtained an order to dissolve the injunction, generally, which was made absolute. C, the third party, not having answered, A and B then issued execution against the plaintiff. Held,

¹ Dunlap v. Clements, 7 Ala. 539; Long v. Brown, 4 Ala. 622; Schermerhorn v. Merrill, 1 Barb. 511.

² Dennis v. Green, 8 Geo. 197.

³ Shricker v. Field, 9 Iowa, 366.

⁴ M'Vickar v. Wolcott, 4 John. 509.

⁵ Gregory v. Stillwell, 2 Halst. Ch. 51.

⁶ Mallett v. Weybossett Bank, 1 Barb. 217.

⁷ Depeyster v. Graves, 2 John. Ch. 148; Price v. Cleavanger, 2 Green, Ch. 207; Wiatt v. Tommasson, 1 Green, Ch. 404.

⁸ Jones v. Magill, 1 Bland, 177.

⁹ Ashe v. Hale, 5 Ired. Eq. 55.

¹⁰ Semmes v. Mayor, &c., 19 Geo. 471.

¹¹ Fowler v. Williams, 20 Ark. 641.

that they were not thereby guilty of contempt of court, but that the orders *nisi* and *absolute* for dissolving the injunction ought to have been confined to A and B.¹

§ 109. The answer of a *corporation*, denying the allegations of the bill, but verified by its corporate seal only, is held insufficient to authorize a dissolution of the injunction.² But, on the other hand, the cashier of a bank is not necessarily one of the corporators, and is not a party to a bill against the bank, unless made so by the bill, and his answer will not be sufficient to dissolve an injunction.³ So where the president of a bank was alleged to be implicated with the bank in the fraud charged in the bill, and was made party thereto, the court refused to dissolve an injunction, issued against the bank alone, upon the oath of the cashier, before the other parties had answered; though the answer of the bank, sworn to by the cashier, was, if true, sufficient ground for dissolving the injunction.⁴

§ 110. The following distinctions are made upon this subject. A corporation may answer a bill for an injunction under its corporate seal, but the injunction will not be dissolved without the oath of some agent or member acquainted with the facts stated in the answer.⁵ But upon a bill for discovery, and to enjoin an action brought by a corporation, the officers being joined; the corporation having answered, held, the injunction should be dissolved.⁶ And the general rule, that an injunction, properly granted, will not be dissolved until all the defendants have answered, does not apply where one of the defendants is a foreign corporation, which cannot be compelled to answer.⁷ (See § 106.)

§ 111. A bill prayed an injunction against a judgment at

¹ *Money v. Jorden*, 1 Eng. Law & Eq. 146.

² *Griffin v. The State Bank*, 17 Ala. 258, overruling *Hogan v. The Branch, &c.*, 10 Ala. 485.

³ *McGuffie v. Planters', &c.*, 1 Freem. Ch. 383.

⁴ *Vandervoort v. Williams*, 1 Clarke (N. Y.), 377.

⁵ *Hemphill v. Ruckersville, &c.*, 3 Kelly, 435.

⁶ *Glasscott v. Copper, &c.*, 11 Sim. 314.

⁷ *Baltimore, &c. v. Wheeling*, 13 Gratt. 40.

law in ejectment, &c. Several of the defendants were *infants*. The parties appeared by counsel. There was no guardian *ad litem* appointed for the infants; there were no answers; there was no decree *pro confesso*; nor was there any evidence by any of the parties. Held, the injunction was properly dissolved.¹

§ 112. A *misjoinder* of plaintiffs is not ground to dissolve an injunction, but only of demurrer.² More especially where it is mere form.³

§ 112 a. An injunction is properly discharged, where the plaintiff fails by his petition to show any right to bring the suit, or any interest in the result.⁴

§ 113. Where the complainant, after a statutory foreclosure, filed his bill to foreclose the same mortgage, alleging that the statutory foreclosure was invalid, and obtained an injunction; it was dissolved, on the ground that he had no longer any interest in the mortgage or mortgaged premises, and that the purchaser at the sale, or his grantees, should have filed the bill.⁵

§ 114. Where a member of Assembly, in Virginia, before its session, obtained an injunction to stay proceedings in execution against his property; held, that he could not object his privilege as a member, to prevent the hearing of a motion to dissolve the injunction during the session.⁶

§ 115. *Intervenors* in an injunction suit can oppose the dissolution of an injunction, only by making out a case which would entitle them to an injunction.⁷

§ 116. Where the defendants answer that they have no substantial interest in the subject-matter of the bill, but that

¹ *Stephens v. Hornbrook*, 2 Cart. 666.

² *Abraham v. Plestoro*, 3 Wend. 538.

³ *Tradesman's, &c. v. Merritt*, 1 Paige, 302.

⁴ *Henderson v. Marcell*, 1 Kans. 137.

⁵ *Gilbert v. Cooley*, Walk. Ch. 494.

⁶ *Botts v. Tabb*, 10 Leigh, 616.

⁷ *Taylor v. Gillean*, 23 Tex. 508.

a third person, not a party, is alone interested ; the court will not dissolve the injunction at their instance, for his benefit.¹

§ 117. An injunction against two defendants will not be dissolved, if, construing their answers and the bill together, the allegations of the bill are *prima facie* maintained.²

§ 118. Where an injunction has been issued against a party against whom there is no equity, the court may order it *conditionally dissolved*.³

§ 119. The bill, filed in 1848, stated that in 1817 the complainant's mother agreed with him, that he might take possession of certain land and make improvements, and in consideration of so doing might take the rents and profits during his life ; that he accordingly took possession, and has hitherto continued to cultivate the same ; has built a dwelling-house and other buildings thereon, and has always since been in the occupancy thereof, and taken to his own use the rents and profits ; that in September, 1846, she conveyed the tract to the defendant N., wife of the defendant W, her heirs and assigns, for the consideration of natural love and affection ; that the deed was made and accepted with full knowledge of the rights and interests of the complainant ; and the bill prayed that the deed may be corrected in conformity with the alleged agreement, and an injunction issued restraining the defendants from prosecuting an ejectment, &c. The answer denied all knowledge or information of the agreement, and stated that the defendants are informed and believe no such agreement was ever made, &c. The mother was not made a party. Held, the mother should have been made a party defendant, and, as she was not, the answer was sufficient to dissolve the injunction.⁴

§ 120. Where, after injunction, the defendant *dies*, and the complainant has not revived the suit, the proper mode of proceeding is by order that he revive within a specified time after

¹ James v. Norris, 4 Jones, Eq. 225.

⁴ De Groot v. Wright, 3 Halst. Ch.

² Hammett v. Christie, 21 Geo. 251. 516.

³ Cabiness v. Crawford, 21 Geo. 312.

service of the order, or that the injunction be dissolved.¹ So, *mutatis mutandis*, where, after answer, the complainant dies.²

§ 121. Where there is a motion to continue an injunction, and at the same time the death of the defendant is suggested, the question of the death will be tried *instanter*.³

§ 122. Where the answer of the defendant is made and sworn to before his death, it may be used on a motion to dissolve the injunction, though filed after his death.⁴

§ 123. A motion to dissolve an injunction, on the coming in of the answer after the death of the complainant, administration not having been granted on his estate, will not be heard.⁵

§ 124. It is no objection to the dissolution of an injunction, that the representatives of a deceased party have not put in their answer, where the foundation of the injunction is a fraud charged against them jointly with the other defendants.⁶

§ 125. Where four plaintiffs united in the same bill for an injunction to stay four several judgments at law against them respectively, on grounds common to all, against five defendants, and the injunction was granted; and, pending the suit, two of the plaintiffs and three of the defendants died: an order, that unless the living plaintiffs, and the representatives of the deceased plaintiffs, should revive the injunction in the name of the representatives of the deceased plaintiffs, against those of the deceased defendants, on or before a certain day, the injunction should stand dissolved, was held irregular and erroneous.⁷

§ 126. Where a *receiver* has been appointed in a creditor's

¹ Cummins v. Cummins, 4 Halst. Ch. 173.

² White v. Fitzhugh, 1 Hen. & M. 1; Carter v. Washington, 1 Hen. & M. 203.

³ Thompson v. Allen, 2 Hay. 237.

⁴ Dennis v. Green, 8 Geo. 197.

⁵ Hill v. Jones, 1 Mur. 211.

⁶ Wakeman v. Gillespy, 5 Paige, 112.

⁷ McKays v. Hite, 2 Leigh, 145.

suit, it is not a matter of course to dissolve the injunction upon a full denial of the equity of the bill, if there is good reason for retaining the property in the hands of the receiver.¹

§ 127. Where a defendant is restrained by injunction from collecting his debts, and preserving or disposing of perishable property, the complainant should apply for the appointment of a receiver ; and, if he neglects to do so, the court will dissolve the injunction, so far as to enable the defendant to preserve it himself.²

§ 128. Although it is a good objection to an application for the appointment of a receiver in a creditor's suit, that no execution has been issued to the county in which the judgment debtor resided ; yet, when the complainant has sworn, in his bill, that an execution has been so issued, an injunction will not be dissolved upon a simple affidavit contradicting that fact, but the defendant must put in his answer, denying the allegation, and then move to dissolve the injunction on bill and answer.³

§ 129. An injunction issued on a bill filed in the old Chancery Court of New York, in June, 1847, was ordered to be dissolved, unless the plaintiff gave the injunction bond required within thirty days. He failed to give the bond, and before the expiration of the thirty days, and after the new Constitution went into effect, dismissed his bill, and filed a new bill, substantially the same, in the Supreme Court, on which he applied to a judge at chambers, and the injunction was granted. Held, the proceeding was irregular, and, if there were grounds for an injunction on the new bill, he should have applied for a temporary injunction, and had an order to show cause why it should not be continued until the hearing.⁴

§ 130. Service of the rule *nisi* for dissolving an injunction in vacation, under the rules in equity, in Georgia, may be

¹ *Bank, &c. v. Schermerhorn*, 1
Clarke (N. Y.), 303.

² *Osborn v. Heyer*, 2 Paige, 342.

³ *Strange v. Longley*, 3 Barb. Ch.
650.

⁴ *Harrington v. American, &c.*, 1
Barb. 244.

made on the complainant's solicitor, after appearance by the defendant's solicitor.¹

§ 131. The injunction meant by the Alabama statute (Clay's Digest, 357, § 79), upon the dissolution of which the bond is to have the force and effect of a judgment, is the writ of injunction, and, unless such writ issues, there is nothing to support the statutory judgment.²

§ 131 a. When an injunction restraining a judgment at law is dissolved, the judgment plaintiff should be required to execute a refunding bond, under § 2982 of the (Ala.) Code.³

§ 132. In New York, a voluntary dismissal of an injunction bill, after answer, is *prima facie* evidence that the complainant was not entitled equitably to an injunction, and the defendant may therefore have a reference to ascertain his damage by reason of the injunction. Such dismissal takes the cause from the calendar, but does not prevent consequential proceedings, and motions may still be made in the suit. A notice of hearing, after a dismissal of the suit, is irregular, but not such a proceeding as will be set aside on motion.⁴

§ 133. Where an injunction is wholly dissolved in a county or corporation court, in Virginia, the bill is not to stand dismissed until two terms succeeding have been held in such county or corporation; and the appellate court will not presume, from lapse of time, that two such terms have been held, but this must expressly appear in the transcript.⁵ It is doubted, whether the neglect of the clerk to enter the dismissal after the lapse of two terms can have the effect to keep the cause on the docket.⁶

§ 134. A bill for an injunction and other specified relief ought not to be dismissed at the next term after a dissolution

¹ Moore v. Ferrell, 1 Kelly, 7.

² Shorter v. Mims, 18 Ala. 655.

³ McLaughlin v. McLaughlin, 36 Ala. 145.

⁴ Mutual, &c. v. Roberts, 4 Sandf. Ch. 592.

⁵ Pitts v. Tidwell, 3 Munf. 88.

⁶ Ib.

of the injunction, under the statute of Virginia of 1804.¹ The statute does not apply to causes instituted before the statute went into operation.²

§ 135. In California, an injunction granted *ex parte* may be dissolved without notice.³

§ 136. In California, a county judge, in granting an injunction, acts in the place of the district judge, and therefore the latter may dissolve the injunction as if granted by himself.⁴

§ 137. In Texas, a motion to dissolve an injunction may be determined at any time, even pending a motion for continuance to obtain testimony.⁵

§ 138. In Georgia, parties may be called out of the county where their cause is pending, to argue a motion to dissolve an injunction.⁶

§ 139. The argument of a motion to dissolve an injunction may be heard in chambers; it is no more a trial of the case than the hearing of an application for injunction.⁷

§ 140. In Kentucky, the remedy for the improper dissolution of an injunction is by prayer for stay thereof, and application in the mean time to a judge of the Court of Appeals, under §§ 326, 327 of the Code.⁸

§ 141. On overruling a motion to dissolve an injunction, before final decree, the parties should be heard on the merits of the bill, if a default has not been taken.⁹

§ 142. When an interlocutory order is made, that a motion to dissolve an injunction should stand as part of the answer, it cannot cause irreparable injury, and, consequently, cannot

¹ Singleton v. Lewis, 6 Munf. 397.

⁶ Semmes v. Mayor, &c., 19 Geo.

² Callego v. Quesnall, 1 Hen. & M. 471.

⁷ Ib.

³ Borland v. Thornton, 12 Cal. 440.

⁸ Rodman v. Forline, 2 Met. (Ky.) 325.

⁴ Ib.

⁵ Smith v. Ryan, 20 Tex. 661.

⁹ Ottawa v. Walker, 21 Ill. 605.

be appealed from. And when the motion puts at issue the truth of the allegations of the petition for injunction, it is proper that such an order should be made.¹

§ 143. Pending an injunction, granted upon the authority of a case that was ultimately overruled, the defendant acquired a statutory right as against the plaintiff. Held, that, upon dissolving the injunction, the court would not impose terms upon the defendant which would have the effect of depriving him of his right so acquired.²

§ 144. On the dissolution of an injunction, either surety may at once pay the amount and claim contribution from the co-surety, and that though the principal be solvent.³

§ 145. Where a motion is not made to dissolve an injunction until the cause is regularly set for hearing on the court docket, the hearing shall be final.⁴

§ 146. A motion to dissolve an injunction ought not to be continued, unless from some very great necessity.⁵

§ 147. It is the practice in Maryland, where a doubt is entertained as to the propriety of granting an injunction, or where, when granted, it operates in restraint of public commissioners for the opening of a road or the like, or stops or embarrasses the operation of a large manufacturing establishment, or restrains a public ferry, and in other cases of a peculiar character, to appoint a very early day for hearing the motion for a dissolution, and that, too, with or without answer. But where the injunction, by the defendant's own showing, operates in restraint of a right recently acquired, or not long decidedly and exclusively enjoyed, and there is nothing peculiar in the case; it must, as in other cases where individuals only are restrained, take the course of the court.⁶

¹ *Denson v. Stewart*, 14 La. An. 703.

² *South Staffordshire, &c. v. Hall*, 8 Eng. Law & Eq. 229.

³ *Buckner v. Stewart*, 34 Ala. 529.

⁴ *Byrne v. Lyle*, 1 Hen. & M. 7.

⁵ *Radford v. Innes*, 1 Hen. & M. 7.

⁶ *Williamson v. Carnan*, 1 Gill & J. 184.

§ 148. We shall hereafter consider at length the application of the remedy of injunction to restrain proceedings upon *judgments at law*. (See Chap. V.) Numerous points arise in this class of cases, with particular reference to the *dissolving* of injunctions.

§ 149. The plaintiff had obtained the common injunction to stay execution in an action on the same day that the action was tried, but before verdict. Held, upon motion by the defendant, before answer, the plaintiff must pay the amount of the judgment into court within a specified time, or the injunction must be dissolved.¹ So, upon a bill for an injunction upon a judgment at law, and to have the benefit of a set-off, in the answer to which, the defendant consented to make a certain allowance; the plaintiff failed to prove his claim, and obtained an order upon the basis, and for the amount, of the defendant's admission. Held, the injunction could not be continued.² And on a bill to enjoin a judgment, if it appear, on final hearing, that the judgment ought not to be enjoined, and that the complainant was allowed a credit at law which should not have been allowed; the injunction should not only be dissolved, but the amount of that credit should be decreed against him.³ So an injunction to stay a judgment was granted more than six months after it was rendered, and the grounds for the injunction appeared to have existed and been known to the party when the judgment was rendered. Held, the injunction ought to be dissolved.⁴

§ 150. An injunction staying judgment will be dissolved, unless the equity of the bill is confessed by the answer, or unless the answer is unfair, evasive, and so defective as to be subject to exception.⁵ Or where the answer has so far denied the allegations of the bill as to leave it without equity as respects the remaining facts not denied.⁶ It makes no difference that the bill is sworn to by several plaintiffs. And giving bond to secure the amount of the judgment does not entitle the plaintiff to retain the injunction, after a full denial of the equity

¹ *Anderson v. Noble*, 13 Eng. L. & Eq. 45.

² *McClure v. Miller*, 1 Bail. Ch. 107. 30.

³ *Todd v. Bowyer*, 1 Munf. 447.

⁴ *Doss v. Miller*, 6 Tex. 338.

⁵ *Capehart v. Mhoon*, 1 Busb. Eq.

⁶ *Rogers v. Bradford*, 29 Ala. 474.

of the bill.¹ But where a bill for relief against a judgment stated, that the judgment was recovered for the price which the plaintiff in the bill had promised to pay for certain work to be performed by the defendant, after the contract for the work had been abandoned in consequence of his inability to complete it, and the answer denied the facts charged, but alleged that the damages to the defendant, by breach of the contract, were equal to the amount of the judgment; held, this was not such a denial of the equity stated in the bill as to justify the dissolution of an injunction.²

§ 151. Where an injunction to a judgment is dissolved, a decree for the amount of the judgment ought not to be made against the complainant, but the creditor should be left to his remedy on the judgment; and so, though the judgment creditor has deceased, and a revival of the judgment will be necessary.³

§ 152. An injunction to a judgment for the purchase-money of land, obtained by the vendee on the ground of a defect of the vendor's title, being dissolved, he obtained another injunction, on the ground, which he sustained, that he was entitled to compensation for a deficiency in the quantity of the land, equal to the amount of unpaid purchase-money. Held, he was entitled to relief against the damages which accrued on the dissolution of the former injunction, as well as the judgment itself.⁴

§ 152 a. A decree against the surety in the injunction bond for the amount of the judgment at law and costs, and interest thereon at six per cent., damages, and costs in equity, is erroneous.⁵ And, on dissolving an injunction upon a judgment, it is not competent for the court to decree that execution shall issue against any person except the defendant in the judgment or his administrator.⁶

¹ *Manchester v. Dey*, 6 Paige, 295.

² *Skinner v. White*, 17 John. 357.

³ *Medley v. Pannill*, 1 Rob. (Va.) 63; *Duncan v. Morrison*, Bre. 113.

⁴ *Crawford v. McDaniel*, 1 Rob. (Va.) 448.

⁵ *Hubbard v. Hobson*, Bre. 147; *Richardson v. Prevo*, Bre. 167; *Duncan v. Ingles*, Bre. 215.

⁶ *Harris v. Carter*, 3 Stew. 233.

§ 153. Upon application for an injunction to restrain the execution of a judgment at law, on the ground of errors in the account on which the judgment was founded, and which were pointed out in the bill, the preliminary injunction was dissolved upon the answer, as to so much of the bill as was therein denied.¹ So, when payments have been made on a judgment after an injunction upon it has been dissolved, and the bill continued; the decree, at the dismissal of the bill, should be for the balance due at the time, and the legal penalty on that balance.² So where, in a suit in chancery for land, the complainant has recovered a part of the land, and there has been an injunction as to the balance; the court, in their final decree, should dissolve such injunction, and permit the plaintiff in ejectment to recover his full costs at law.³

§ 154. Similar questions arise, having more particular reference to the *execution* upon a judgment at law.

§ 155. Where an injunction to stay the sale of any particular property, by virtue of certain levies, has been dissolved as to a part of the property only, and continued as to the balance, and the property released, not diminished in value in consequence of the injunction, has been sold, and the proceeds of the sale applied to the judgments under which the levies had been made; no decree against the complainant should be rendered, on account of the dissolution of the injunction, for the amount of the judgment, penalty, &c.⁴ So where a stranger to the record obtains an injunction against the sale of property on execution, and it is dissolved; judgment cannot be rendered against him and his sureties for the amount of the original judgment.⁵ And where an injunction to set aside an execution sale is dissolved, equity cannot render judgment against the complainant for the amount of a judgment at law in his favor.⁶ So, where an execution has been properly enjoined, it is an error for the court, upon dissolving the injunction for causes arising subsequent to its issue, to render

¹ *Martin v. Spier*, 1 Hay. 369.

² *Lewis v. Sutliff*, 8 Ham. 60.

³ *Bradford v. Allen*, Hardin, 1.

⁴ *Teaff v. Hewett*, 1 Ohio St. 511.

⁵ *Carlin v. Hudson*, 12 Tex. 202.

⁶ *McDonald v. Cook*, 11 Mis. 632.

judgment against the defendant in execution and his sureties in the injunction bond, for the amount of the original judgment, interest, and costs.¹ (a)

§ 156. Where an execution was returned by the officer more than a month before the return day, and a judgment creditor's bill was filed after the return day, the injunction was dissolved.²

§ 157. By an award between two partners, A was to pay B a certain sum, and B was to pay certain debts of the partnership. Afterwards two executions for such debts were levied on the goods and lands of both A and B, and A obtained an injunction against the sale of his lands before those of B should be sold. It appeared that A had not paid to B the sum awarded. On motion to dissolve the injunction, an order was made that A pay that sum on the executions within thirty days, or that otherwise the injunction should be dissolved.³

§ 158. Where an injunction has been dissolved, and the money collected by an execution at law, and paid into the court of law, equity will, upon proper affidavits, direct the money to be paid into the office of the clerk and master of the court; and when the interests of the plaintiffs at law are several, the court will direct that the parts belonging to those who are insolvent, or removed out of the State, shall not be paid to them, until they have given bond and security, respectively, that they will refund the money, if the court of equity shall ultimately make a decree in favor of the plaintiffs in equity. And if such bonds shall not be given, after due notice, the clerk and master shall lend out the money upon bond and good security, to be subject to the future orders of the court.⁴

¹ Bryan v. Bridge, 10 Tex. 149.

² Runyon v. Brokaw, 1 Halst. Ch.

³ Stafford v. Hulbert, Harring. Ch. 340.
435.

⁴ McDowell v. Simms, 7 Ired. Eq.
50.

(a) It is the practice of the courts in Texas, on the dissolution of an injunction restraining the collection of an execution, to enter up judgment against the principal and sureties in the injunction bond, for the amount of the execution, under Articles 1602 and 1603 of the statute. Fall v. Ratliff, 10 Tex. 291.

§ 159. Where judgments at law, upon which executions have issued, and been levied upon lands, are enjoined; after the dissolution of the injunction, nothing more is necessary to authorize the sheriff to sell, than writs of *venditioni exponas*; the lands are to be regarded as *in custodia legis*, and the death of the defendant in the judgments, after execution had issued and been levied, does not render a *scire facias* necessary against his heirs or terre-tenants.¹

§ 160. In February, 1841, A recovered a judgment against B, and issued an execution thereon, which was levied on a house and lot as the property of B. C, his son, for himself, and as guardian of his infant children, filed a bill, stating that B, in July, 1773, sold and conveyed the land to him, and in December, 1837, sold and conveyed the lot to his wards, and that both deeds were recorded in 1846, and stating facts tending to show the validity of the deeds, and praying an injunction to restrain A from proceeding with his execution. The injunction was allowed. An answer denied the validity of the deeds, stated facts to sustain the denial, and insisted that they were not valid against the judgment, because not recorded in season. Held, that both questions were properly triable at law, on ejectment, by the purchaser under the execution; and that the judgment creditor should be permitted to proceed. The injunction was dissolved.²

§ 161. Analogous to the case of judgments and executions as the subject-matter of injunction, is that of *suits at law*, prior to judgment, which will also be considered at length. (See Chap. VI.)

§ 162. An injunction, staying proceedings in sixty-seven suits, commenced in one day against the county commissioners, before justices of the peace, on county orders, was, on motion, dissolved, on the ground that their defence was at law.³

¹ *Boyd v. Harris*, 1 Maryland, Ch. Decis. 466

² *Lopeer County v. Hart*, Harring. Ch. 157.

³ *Freeman v. Elmendorf*, 3 Halst. Ch. 475, 655.

§ 163. If a case is retained in a court of equity for final relief, and the complainant is the defendant in an action at law in regard to the same subject-matter at the same time, an injunction granted to stay the proceedings at law will be continued till the case is settled in equity.¹

§ 164. Where an injunction restraining proceedings at law before judgment is dissolved, it is erroneous for the court to decree judgment for the debt; the court, as a court of chancery, has nothing to do with the case, after dissolving the injunction, and awarding damages.²

§ 165. An injunction was granted to restrain a suit at law, but with liberty to proceed to judgment. On motion to dissolve the injunction, it appeared by the answer, and affidavits in support thereof, that the same persons, upon whose affidavits the injunction was granted, were witnesses in the suit at law, and that the jury found a verdict in opposition to their testimony, and that the plaintiff had no personal knowledge of the facts stated in his bill. The injunction was thereupon dissolved.³

§ 166. A suit at law was brought in favor of A and B, against C, on a draft. C filed a bill of discovery against A and B, to discover whether they ever were the owners of the draft, or paid any money for it, and obtain an injunction. The answer by A (B being dead) disclosed all the facts within the knowledge of A, and left the legal consequences of these facts to the court. Held, that A had answered fairly and properly, and the injunction was dissolved.⁴

§ 167. An order of injunction for restraining the commencement of a suit may be reversed, although an injunction bond has been given.⁵

§ 168. An injunction, to stay proceedings in one suit until the determination of another, may be dissolved after judgment

¹ *Mulford v. Bowen*, 1 Stockt. 797.

² *Powers v. Waters*, 8 Mis. 299.

³ *Brown v. Haff*, 5 Paige, 235.

⁴ *Adams v. Whiteford*, 9 Gill, 501.

⁵ *King v. Hall*, 5 Cal. 82.

in the latter in the (Texas) District Court, though notice of appeal has been given.¹

§ 169. An injunction to a suit at law, upon a bill praying for relief as well as discovery, will not be dissolved, on the ground that the equity of the bill has been fully answered.²

§ 170. An injunction, to restrain the sale of goods pending an action at law, is necessarily dissolved, on dismissal of the action.³

§ 171. The question, of a defendant's right to bring an action of trespass *quare clausum* against the plaintiff, is exclusively a legal one, and cannot be considered in discussing the propriety of dissolving an injunction.⁴

§ 172. Where, on examining the plaintiff's claim of title to timber land from which the defendant has been restrained from cutting, the court is fully satisfied that the plaintiff has no title; the injunction will be dissolved, though an action of trespass is still pending.⁵ (a)

¹ Wolf v. Durst, 10 Tex. 425.

² Brown v. Edsall, 1 Stockt. 256.

³ Phelps v. Foster, 18 Ill. 309.

⁴ Wright v. Grift, 11 Busb. 203.

⁵ Westcott v. Gifford, 1 Halst. Ch. 24.

(a) The subject of *damages* is an important one, in connection with the dissolving of injunctions; so far governed, however, by express statute and local practice, as often to render the decisions in one State inapplicable in another. See Chap. II. § 41.

In Texas, upon dissolution of an injunction, it is not error to *enter up judgment* against the principal and his sureties in the injunction bond. *Western v. Woods*, 1 Tex. 1. On dissolution, judgment may be rendered on the bond, and execution issue thereon as of course. Where the petition is continued for trial, a refunding bond may be required, as a condition of issuing execution; but where the injunction is dismissed for want of equity in the bill, the suit is thereby determined, and there need be no continuance nor refunding bond. *Pryor v. Emerson*, 22 Tex. 162. In this case the motion to dissolve was sustained, and judgment and execution ordered on the bond, disposing of the whole subject-matter, and no motion was made to continue for trial. Held, that the judgment, though not in form, was yet in substance *final*, within the meaning of the above-mentioned rule. *Ib.*

In New York, want of jurisdiction in the court, over the subject-matter of the action, does not, on dismissal of the complaint, affect the right to damages upon the undertaking given on the issuing of an injunction, when it is dissolved. *Cumberland, &c. v. Hoffman, &c.*, 39 Barb. 16. Upon reference to a master, to

ascertain the damages which the defendants had sustained, by reason of an injunction restraining them from selling mortgaged premises, under a decree of foreclosure, in another suit, after the premises had been advertised for sale under such decree; held, the master's fees for services which had been performed a second time, after dissolution of the injunction, and the expense of re-advertising the sale, were properly allowed. *Edwards v. Bodine*, 11 Paige, 223. After dissolution of an injunction in restraint of a suit at law, the plaintiff in the suit obtained a verdict, and thereupon moved for payment of his costs in the suit, which were occasioned by the injunction, out of the deposit made by the plaintiff on obtaining the injunction. Held, that the right to the deposit must abide the event of the cause. *Leggett v. Dubois*, 1 Paige, 574. Taxable costs and reasonable counsel fees, on the application to dissolve the injunction, are properly allowed as damages. *Edwards v. Bodine*, 11 Paige, 223. So counsel fees, for defending the suit, and moving to dissolve the injunction, may, under the New York Code, be included in the damages allowed by a referee to the party enjoined. *Coates v. Coates*, 1 Duer, 664. (See Chap. II., § 54.) Where an injunction is dissolved upon the matter of the bill only, it is a final decision that the plaintiff was not entitled to the injunction; and the defendant may proceed at once to ascertain his damages under the rules of court. But where the injunction is dissolved upon bill and answer, the final decision is not deemed to be made until the final hearing of the cause. *Dunkin v. Lawrence*, 1 Barb. 447.

In Kentucky, where the complainant's property is taken and sold to satisfy an execution against another person, he cannot on that ground have relief in equity; and ten per cent. damages should be given, on dissolving an injunction obtained by the complainant to stay proceedings on a sale bond in such a case. *Fawcett v. Pendleton*, 5 Litt. 136. It is proper, in dismissing a bill, not to award damages on a judgment at law, when the order enjoining the judgment was signed by only two justices, the act then in force requiring the concurrence of three justices. *Wilkins v. Owings*, 5 Litt. 239. In dissolving an injunction upon a judgment, damages should be awarded only on so much of the judgment as the plaintiff has a right to collect. *Ward v. Davidson*, 2 J. J. Marsh. 443; *Southerland v. Crawford*, 2 J. J. Marsh. 369. Where an injunction has been granted without requiring any bond, and the bill has been prosecuted in good faith, damages will not be awarded on dissolving it. *Lexington, &c. v. Applegate*, 8 Dana, 289. Nor where an injunction was rightfully awarded, but afterwards properly dissolved upon matters done or arising afterwards. *Taylor v. Bush*, 5 Monr. 84. So an injunction was obtained by a surety in a bond, restraining a levy on his property, until land of the principal had been first levied on. Held, the plaintiff's judgment having been satisfied from the estate of the principal, the plaintiff was entitled to no damages, on the injunction's being dissolved. *Kilpatrick v. Tunstall*, 5 J. J. Marsh. 80. Where no injunction is obtained, though a bill is filed, a decree for damages and dissolution of the supposed injunction is erroneous. *Harlan v. Wingate*, 2 J. J. Marsh. 138. So where an injunction is prayed for, but not granted, and the bill is dismissed, damages cannot be given. *Garner v. Strode*, 5 Litt. 314. Nor upon the dissolution of injunctions not granted by competent authority. *Montgomery v. Houston*, 4 J. J. Marsh. 488. So, where a bill is filed by the vendee of land to perfect his title under the purchase, before the title is made or tendered, and an injunction ordered to restrain collection of the purchase-money, and the title is made complete before the hearing; the dissolution of the injunction should be without damages. *Lampton v. Usher*, 7 B. Mon. 57. Where an injunction of

the enforcement of a replevin bond is dissolved on bill and answer, the complainant should be decreed to pay ten per cent. damages on the amount enjoined. *Yantis v. Lyon*, 3 J. J. Marsh. 152. The statute, directing damages to be given on decreeing the dissolution of an injunction against a judgment, applies to the case of a replevin bond, given on satisfaction of a decree for money, which is enjoined. *McIlvoy v. McIlvoy*, 4 Dana, 289. A bought land of B, but, finding after he had made one payment that there were other claims to the land, refused to pay the balance, and obtained a judgment at law, and brought his bill to cause the right to be determined. On the injunction being dissolved, A was decreed to pay damages, but, on appeal, the decree was reversed, with costs. *Massie v. Sebastian*, 4 Bibb, 433. It is erroneous to dissolve an injunction twice, and give two distinct and separate decrees for damages, when there was but one order for an injunction in the case. *McIlvoy v. McIlvoy*, 4 Dana, 289. No damages should be decreed on dissolving injunction of decrees in chancery. *Martin v. Wade*, 5 Monr. 77; *Head v. Perry*, 1 Monr. 253. Where a final decree awarding a perpetual injunction against a judgment at law is reversed in the appellate court, the damages are recoverable, though no injunction bond has been entered into, and no original injunction, at the commencement of the cause, has ever issued. *Davis v. Ballard*, 7 Monr. 603.

In Louisiana, the judge may allow damages to the amount of twenty per cent. on the judgment enjoined, without proof. *Williams v. Close*, 14 La. An. 737. But when counsel fees are proved and allowed, exceeding twenty per cent., the judge cannot, in addition to such allowance, award twenty per cent. as damages. And counsel fees will not be allowed as special damages, where an injunction is maintained against a seizure of property, and the case is not a proper one for vindictive damages. *Neveu v. Voorhies*, 14 La. An. 738. The amount of damages for the wrongful suing out of an injunction must be ascertained by the amount enjoined; and when that amount does not appear of record, none will be allowed on appeal, but reserved to the party enjoined. *McCloskey v. Central, &c.*, 16 La. An. 284. Where an injunction has been sued out on grave charges of fraud and simulation, and the plaintiff offers no evidence whatever to sustain them; the maximum of damages allowed by law should be awarded. *Oulliber v. Joubanc*, 12 La. An. 237. On dissolution of an injunction, restraining an execution on a twelve months' bond, bearing eight per cent. interest, damages can only be awarded at the rate of twelve per cent. *Campbell v. Oliver*, 15 La. An. 183. Damages are not allowed, under the statute, where the plaintiff in part prevails, and the process has not been palpably abused. *Raiford v. Thorn*, 15 La. An. 81. On dissolution of an injunction against an execution on a twelve months' bond, bearing eight per cent. interest, damages can only be awarded at the rate of twelve per cent. *Campbell v. Oliver*, 15 La. An. 183. An injunction bond, improperly made payable to the sheriff, his heirs and assigns, instead of to the defendants in the suit, is, nevertheless, sufficient to sustain an action in behalf of the real parties in interest. *Vicksburg, &c. v. Barksdale*, 15 La. An. 465. Upon dissolution of an injunction against the execution of an order of seizure and sale, without the bond and security required by the Code of Practice, — Articles 739, 740, — the defendant is entitled to five per cent. damages on the amount of the judgment. *Wirtkowski v. Selby*, 15 La. An. 328.

In Ohio, when an injunction restrains proceedings by a judgment debtor against certain property claimed by a third party, without interfering with the creditor's remedy against other property or the person of the debtor, who is not made a party to the bill, and the injunction is subsequently dissolved, and the

bill dismissed; the court will not decree, on motion, against such third party, for the amount of the judgment. *Portsmouth, &c. v. Byington*, 12 Ohio, 114.

In Missouri, by statute (Sess. acts, 1849, p. 85, § 12), upon the dissolution of an injunction, damages shall be assessed by the court or jury; but, if money shall have been enjoined, the damages shall not exceed ten per cent. on the amount released, exclusive of legal interest and costs. This restriction does not apply to the case where the sale of trust property has been enjoined. *City, &c. v. Alexander*, 23 Mis. 483. In case of dissolution of an injunction against a sale upon a deed of trust given as security, the damages are not the difference between the value of United States treasury notes at the granting and dissolution of the injunction. *Riddlesbarger v. M'Daniel*, 38 Mis. 138.

The damages of six per cent., authorized to be imposed in Alabama, where an injunction is obtained for delay, cannot be allowed, unless the facts stated in the bill are shown to be untrue or evasive, nor where the bill is dismissed for want of equity. *Crawford v. Bank, &c.*, 5 Ala. 55. Where a cause for injunction against a judgment is submitted on bill and answer, and the defendant denies the equity of the bill, and alleges that it was filed for delay; six per cent. damages may be allowed on the judgment. *Weissinger v. Johnson*, 13 Ala. 93.

Where an injunction to restrain a sale of lots advertised for sale was dissolved, and the complainant's bill dismissed, the answer of the defendant showing that he would be obliged to advertise the lots again, and incur the additional expense; it was held, that a decree to the defendant of the cost of advertising them was proper. *Edwards v. Pope*, 3 Scam. 465.

In Mississippi, where the court is of opinion that an injunction was sued out for delay, damages may be awarded on its dissolution, but not otherwise. *Tyler v. McCardle*, 9 S. & M. 230.

In Arkansas, where an injunction was granted, under the territorial laws, and the injunction was dissolved and damages assessed after the State laws went into force, it was held, that the court had no power to assess greater damages than were authorized by the State laws. *Miller v. Hemphill*, 4 Eng. 488. Where on a bill in chancery the defendant's slaves are taken from his possession, and judgment finally rendered in his favor, his damages should be what the slaves would have been worth to him had they continued in his possession, and any losses or injury resulting as a direct, proximate, and natural consequence of their removal; but not when remote, speculative, and involving inquiries collateral to the consideration of the wrongful act, such as counsel fees in the suit, or expenses paid for the conducting his business while defending the suit, nor losses in such business, incurred by absence. *McDaniel v. Crabtree*, 21 Ark. 431.

In Vermont, A and B, as trustees of the bondholders of a railroad, leased it to a railroad company. The orators, owning one quarter of the bond, brought a bill, for themselves and all other bondholders who should choose to come in and prosecute, against A and B and the lessees, to set aside the lease. An injunction was granted against the use and occupation of the road by the defendants, the orators giving a bond for damages. The bill being dismissed, held, the relation of the trustees and the orators was such as to excuse the lessees from paying rent to the trustees pending the injunction, and therefore the trustees were entitled, as damages, to that proportion of the rent, pending the injunction, which belonged to the bondholders, not parties. *Sturgis v. Knapp*, 33 Verm. 486. In case of an injunction against bondholders of a railroad, to restrain the use of the road, upon dismissal of the bill, the defendants may have damages, a bond having been given,

although at the time of the injunction a receiver was appointed and took possession of the road ; deducting, however, the net receipts of the receiver. *Ib.* The damages, upon dissolution of an injunction of a money judgment, should not include the amount of the judgment. *Roberts v. Fahs*, 36 Verm. 268.

CHAPTER IV.

VIOLATION OF INJUNCTIONS.

1. Conformity of the injunction and the bill.
3. When an injunction takes effect.
4. Advice of counsel.
5. Parties bound.
7. Officers.
8. Joint parties.
10. Plaintiff must show an interest.
11. Penalty for violation.
17. Attachment — course of proceeding.
21. Commitment.
- 21 a. Restoration of property.
22. Writ of assistance.
23. Abatement.
24. Motion for dissolution.
25. Waiver.
26. What constitutes a violation — notice.

§ 1. THE *violation*, as well as dissolution, of injunctions gives rise to numerous and important questions. (a)

(a) The whole subject, involving several points which are hereafter distinctly considered, is thus treated by Chief Baron Comyns: "If a person, served with an injunction, afterwards proceeds at common law, it is a contempt to the chancery, and he will be committed. Semb. 22 Ed. 4, 37. Yet there it was said per Hussey, that B. R. would grant a *Habeas Corpus* and dismiss him. It shall be served in the same manner as a *subpœna*, and if, after service, it shall be dissolved, all process for contempt issues, till the offender be taken and committed upon an affidavit of his disobedience. And when he is taken he shall be committed, till he obeys or gives security for his obedience, and shall not be heard in the principal case, until he obeys. If execution be taken out, after an injunction, the party shall make restitution for all damage that appears to be done to the plaintiff by his affidavit. No one shall be restrained by an injunction, if he be not named. But if it be served upon the attorney, &c., and the defendant afterwards proceeds himself, he will be in contempt. And, if a man disobeys an injunction, he will be in contempt, though it was not regularly obtained. And though the party would not permit him to have the writ, to examine it with the copy served. An injunction may be by *parol*, to one present in court. Or it shall be in writing." Com. Dig. Chancery, D. 8.

§ 2. It is sometimes held, that a defendant is not enjoined by so much of an injunction as goes beyond the prayer of the bill.¹ But it is also held, that, while an injunction is in force, it must be obeyed, though broader than is authorized by the bill. That the remedy of the defendant is to apply for a modification of the injunction.² On the other hand, the defendant should not be referred to the bill to learn the matter enjoined. But, if he has knowledge of the matter *dehors* the injunction, an infringement will not be excused, because he is so referred.³

§ 3. If the defendant be informed of the issuance of an injunction, he will be bound thereby, as if it had been actually served, and will be committed for the breach of it. So, also, if he is informed that an injunction has been granted, and its issue has not been unnecessarily delayed.⁴ A party is in contempt of court, who knows that an injunction has issued, or is about to issue, against him, and yet commits the act prohibited, before the injunction can be formally issued and served upon him.⁵ (a) As where a party is in court, and hears

¹ Freeman v. Deming, 4 Edw. Ch. 598.

⁴ Foster v. Farnsworth, 1 Swan, 1.

² Richards v. West, 2 Green, Ch. 456.

⁵ Endicott v. Mathis, 1 Stockt. 110;

Waffle v. Vanderheyden, 8 Paige, 45;

Haring v. Kauffman, 2 Beasl. 397. See

³ Byam v. Stevens, 4 Edw. Ch. 119. § 32.

(a) The following case is found reported in the (Philadelphia) Legal Intelligencer (Peirce et al. v. Post et al.): "Sur rule to show cause why attachment should not issue against James B. Carr. Opinion by Sharswood, J. James B. Carr is one of the defendants in the bill: he has been put on the witness stand by the plaintiffs, and is under examination before an examiner appointed to take testimony in the cause. He was called on by the plaintiff's counsel to produce his bank books and check books containing entries alleged to relate to the matters in controversy. He admits the possession of one bank book but denies that he has any other bank books and check books. Under the advice of his counsel he declines to produce the bank books, and on the report of the examiner a rule has now been taken for an attachment against him.

"An attachment is never issued against a party or witness unless he is shown to be guilty of contempt of the court. He can only be in contempt by disobeying some process or order of the court previously served upon him. Such service must be shown to have been personal. Even attachments against the sheriff for not returning process are never issued without proof that a certified copy of the rule has been served on him. There is no evidence before me of any order or process of the court to produce the book in question having been made or issued, or served upon James B. Carr. In the character of a witness, a subpoena *duces tecum* would have been the proper process: as a party, an order of the court to produce the particular book ascertained by the answer or other evidence to be in his possession. It follows that this rule must be discharged."

an order of injunction pronounced.¹ So where the defendant was duly served with notice of a petition for an injunction to restrain collection of a judgment ; and, on trial, the injunction was ordered to issue upon filing of a certain bond : held, after the bond was filed, the injunction took effect without issual of a regular writ of injunction.²

§ 4. So far as the rights of the plaintiff are affected by the breach of an injunction, it is no defence to the party violating the injunction that he acted with the advice of counsel, though, if he has acted in good faith, he may be protected from punishment as for a criminal contempt.³

§ 5. Defendants duly served with an injunction are personally responsible for a violation of it, in whatever capacity they acted, and from whatever motives.⁴

§ 6. *Pragmatic trespassers*, pending an injunction, may be compelled to remove all erections made by them in breach of the injunction at their own cost.⁵

§ 7. Property attached cannot be sold by the officer, if an injunction not to sell has been issued ; and, if sold, the attaching plaintiff is liable. So an injunction upon a creditor is violated by a sale by the officer, in his presence, without objection, the officer being so far his agent.⁶

§ 8. An injunction against several defendants is binding upon so many as have actual notice of it, though neither the injunction nor *subpœna* has been served upon them.⁷

§ 9. An injunction, issued in a suit by one partner, prohibiting the other from meddling with the partnership property, will not prevent creditors of the firm from proceeding at law to recover their debts ; nor any member of the firm from con-

¹ *Milne v. Van Buskirk*, 9 Iowa, 558.

² *Ib.*

³ *Hawley v. Bennett*, 4 Paige, 163.

⁴ *Quackenbush v. Van Riper*, 2 45.
Green, Ch. 350.

⁵ *Murdock's case*, 2 Bland, 461.

⁶ *Blood v. Martin*, 21 Geo. 127.

⁷ *Waffle v. Vanderheyden*, 8 Paige,

fessing a judgment to such creditors, so as to give them preference in payment.¹

§ 9 a. In a suit by parties in a joint stock banking company, for themselves and other shareholders, to restrain a creditor of the company from suing the shareholders for a debt alleged to have been inequitably contracted; the common injunction restrained the defendants from proceeding at law touching the matters in question. Held, the injunction applied only to the plaintiffs on the record, and was not violated by a proceeding on the part of the defendants against other shareholders not individually named. But if such shareholders would submit to the terms imposed on the plaintiffs, they might, on application of the plaintiffs, have the same relief. It must appear that they stood in the same situation as the plaintiffs; but not necessarily, that on the merits they were entitled to the injunction. But the defendants might show that they were not equitably entitled to the injunction.²

§ 10. On application to the court, in the nature of a civil remedy, to punish for breach of an injunction, the plaintiff must show that he has an interest in the subject-matter or a right to prosecute for the breach, except in the case of infants, lunatics, &c., who are incapable of protecting their own rights.³

§ 11. If parties violate an injunction, an attachment will issue against them for contempt.⁴

§ 12. Slight evidence will justify a judgment *nisi*, to show cause why a party should not be fined, &c., for violating an injunction.⁵ And attachment for a contempt, to recover legal rights lost by violation of an injunction, does not require strictly regular service of the injunctive order. Thus where copies of such order, against waste, not certified by the clerk, were served upon the defendants personally, without exhibiting the original; it is error for this reason to dissolve an attachment

¹ M'Credie v. Senior, 4 Paige, 378.

² Lund v. Blanshard, 4 Hare (30 Eng. Cha.), 290.

³ Hawley v. Bennett, 4 Paige, 163.

⁴ Newark v. Elmer, 1 Stockt. 754.

⁵ Blood v. Martin, 21 Geo. 127.

founded upon an affidavit of an injurious violation of such order.¹

§ 13. It was held, that the value of property, sold in violation of an injunction, should be paid by the party selling to the receiver, the court having assessed it as a fine for contempt.²

§ 14. But where a railroad had been enjoined from giving certain undue preference in carriage to a particular line of transportation, the court refused to grant an attachment against the company for disobedience of the order, their affidavit showing *bonâ fide* endeavor to comply with it.³ And while an injunction, though improperly issued, must be respected so long as it remains in force ; after dissolution, a motion for an attachment, for a violation of the injunction while in force, cannot be sustained.⁴ So, where a case has been removed from a State court to the Circuit Court of the United States, under § 12 of the Judiciary act (1789), it stands as if originally brought in the Circuit Court ; and therefore an injunction, allowed by the State court, falls by the removal, so that the Circuit Court has no power to grant an attachment against the defendant, for a violation of the injunction before the case was removed. But a motion for an injunction on the face of the bill may be heard in the Circuit Court, as if it had been originally filed there.⁵

§ 15. If the damages, caused by a constructive infringement of an injunction, cannot be calculated, an attachment will be refused, and the damages will be left to be embraced in the decree.⁶

§ 16. Where, on a motion for attachment for alleged violation of an injunction, it appeared that there had been no violation ; and further, that the plaintiff had induced the defendant

¹ *Ramstock v. Roth*, 18 Wis. 522.

² *Blood v. Martin*, 21 Geo. 127.

³ *Ransome v. Eastern*, 4 C. B. N. S. 135.

⁴ *Moat v. Halbein*, 2 Edw. Ch. 188.

⁵ *McLeod v. Duncan*, 5 McL. 342.

⁶ *Byam v. Stevens*, 4 Edw. Ch. 119.

to do the acts which constituted the alleged violation : held, the plaintiff must pay the costs of the motion.¹

§ 16 a. A proceeding for contempt by breach of an injunction is held to be on behalf of the people, and, if pending, will not be discontinued by a dissolution of the injunction ; and evidence is admissible on the part of the prosecution to contradict the defendant's answers to interrogatories.²

§ 16 b. In a suit to recover damages for an alleged trespass upon mining claims alleged to be the property and in possession of plaintiffs, and for perpetual injunction against future trespasses, the injunction was granted, motion to dissolve it was refused, and, upon appeal from the refusal, an *ex parte* order was made directing the plaintiffs to yield possession to the defendants ; but the plaintiffs refused to obey, and an order was issued that they should show cause why they should not be punished for contempt. Held, this order was irregular, and must be reversed.³

§ 17. A motion for an attachment, for contempt of court in not obeying an injunction, should state, in the proofs on which the application is founded, the specific acts of omission or commission which constitute the alleged contempt.⁴

§ 18. Where the defendant in this proceeding was ordered to answer certain interrogatories ; held, the interrogatories must be limited to the particular offences specifically alleged in such proofs, and he could not be required to answer as to particulars charged on information and belief, and not on direct evidence.⁵

§ 19. Where interrogatories, unauthorized in law and bad in substance, were demurred to ; held, the defendant was entitled to costs on the demurrer ; but, the defendant having answered other interrogatories, taking issue upon them, that

¹ Sparkman v. Higgins, 2 Blatch. 29.

² Crook v. People, 16 Ill. 534.

³ Brennan v. Gaston, 17 Cal. 375.

⁴ Parkhurst v. Kinsman, 2 Blatch. 78.

⁵ Ib.

the enforcement of the costs should be stayed until the issues were disposed of.¹

§ 20. The proper mode of proof on such issues is by testimony taken orally before a master.²

§ 20 a. In a case of flooding alleged to be caused by a drain, the defendants were enjoined from producing this effect by such drain, but not, otherwise, from doing any definite act. The flooding afterwards occurred, but the defendants denied to the best of their belief that it was caused by the drain. Held, the court would not treat them as contumacious and commit them, until a verdict at law should have conclusively disproved this denial; and such verdict, having been set aside, was insufficient.³

§ 20 b. Where a party, having obtained an injunction, published an advertisement, composed partly of what the court had ordered, and partly of what it had not ordered; the court refused, on motion, to commit him for contempt or to dissolve the injunction, but required him to publish such other advertisements as would correct the error.⁴

§ 21. A party who, after notice of a writ of injunction awarded against him, is guilty of a breach of it, may be committed without production of such writ.⁵

§ 21 a. The defendants having taken out execution in breach of an injunction, and some of the bailiffs, who served the execution, having found out a place in a wall in the plaintiff's house, that was made up again with bricks, wherein was hid £150, and having taken away the money, and done great spoil to the plaintiff's goods, an order was made and affirmed, that the defendants should make good this money to the plaintiff, and should satisfy all other damage which the plaintiff would swear he had sustained. The Lord Keeper "thought it an

¹ *Parkhurst v. Kinsman*, 2 Blatch. 78.

² *Ib.*

³ *Dawson v. Paver*, 5 Hare (26 Eng. Cha.), 424.

⁴ *Matthews v. Smith*, 3 Hare (25 Eng. Cha.), 331.

⁵ *McNeil v. Garrett*, 1 Cr. & Ph. 98.

idle practice in the court to put a thief to his oath to accuse himself, for he that has stolen will not stick to forswear it; and therefore in *odium spoliatoris* the oath of the party injured should be a good charge upon him that has done the wrong.”¹

§ 21 b. An act done by a party, in violation of an injunction issued against him, will be deemed ineffectual as to the purpose intended by him; therefore, if he take possession of premises under a writ of possession, which he had been enjoined from procuring, his possession is unlawful; and the party injured will be relieved as well by a writ of forcible entry and detainer at law, as in chancery.² So where, after an injunction against proceedings under an execution, the officer sells property levied upon before the injunction, he becomes a trespasser *ab initio*.³

§ 22. In case of disobedience of an order to deliver possession, under a decree of sale, containing no direction of that kind, an injunction issues, and, on proof of a refusal to comply with the injunction, a writ of assistance issues to the sheriff, of course. Where the order to deliver possession is made part of the decree of sale, the proper remedy, in case of disobedience, is a writ of execution of the decree.⁴

§ 23. Where a dam had been erected upon a stream, in violation of an injunction issued in a cause then pending, the court, on motion, ordered the dam to be removed.⁵

§ 24. While a party is in contempt for disobedience to an injunction, he cannot properly have a hearing on a motion for its dissolution. Otherwise, where the nature and extent of the punishment to be inflicted for such contempt depend on the question whether the injunction shall be continued or not.⁶

¹ *Childrens v. Saxby*, 1 Vern. 206.

² *Fowler v. Farnsworth*, 1 Swan, 1.

³ *Turner v. Gatewood*, 8 B. Mon. 613.

⁴ *Kershaw v. Thompson*, 4 John. Ch. 609.

⁵ *Hammond v. Fuller*, 1 Paige, 197.

⁶ *Williamson v. Carnan*, 1 Gill & J. 184.

§ 25. The benefit of an injunction is not waived by delaying for three years to proceed for a violation of it.¹ But, an injunction having been ordered April 28, 1855, but not tested till June 11, 1855, and not served until June 4, 1856, a writ of attachment will not be issued against the defendant, for disobeying the injunction. After such a lapse of time, the plaintiff should have applied to the court for permission to use the injunction.²

§ 25 a. Where a bill is pending in one county, and the plaintiff applies for an injunction to a judge or court in another; the writ of injunction is properly made returnable in the former county, and such judge or court has no jurisdiction of an alleged contempt in violating the injunction.³

§ 25 b. The injunction may be granted by a judge sitting in court in the latter county, although the statute seems to contemplate that it should be done out of court. But it has no greater effect in one case than the other, and the judge has no jurisdiction beyond the issuing of the injunction.⁴

§ 25 c. We now proceed to illustrate more particularly by examples, what does or does not constitute a violation of an injunction.

§ 26. Notice of trial is a breach of injunction to stay proceedings in an action at law.⁵

§ 26 a. An order to change the venue is a breach of an injunction to stay trial.⁶

§ 27. An injunction, restraining a party from navigating the bay of New York, applies to the waters between Staten Island and Whitehall Landing in New York city.⁷ And

¹ Dale v. Roosevelt, 1 Paige, 35.

² McCormick v. Jerome, 3 Blatch. C. C. 486. See Jamison v. Knotts, 12 Rich. 190.

³ Androscoggin, &c. v. Androscoggin, &c., 49 Maine, 392.

⁴ Ib.

⁵ Clark v. Wood, 2 Halst. Ch. 458.

⁶ Pariente v. Bensusan, 13 Sim. (36 Eng. Cha.) 522.

⁷ Vanderbilt, 4 John. Ch. 57.

where an injunction was granted, restraining a party from running a steamboat between two points (New York and Elizabethtown), and the defendant proceeded to carry passengers a portion of the distance, when they were transferred to a boat belonging to another person, in which they completed the passage; and he also carried passengers from one *terminus* of the route to a point out of the direct course, and, after a stop of a few minutes, proceeded to the end of the route: held, either course of proceeding was a violation of the injunction.¹

§ 28. Where an injunction was imposed in general terms, without any reference to previous judicial proceedings, from which the defendant claimed to derive his authority; held, the act enjoined was prohibited while the injunction remained undissolved, although a new authority was obtained by the defendant from a similar source.²

§ 29. Where a defendant was enjoined against "selling, pledging, or disposing of" any goods belonging to the plaintiff, a mere offer by him to sell some of the plaintiff's goods was held to be a violation, sufficient to authorize the appointment of a receiver, though not for an attachment.³

§ 30. Upon a bill filed in the (Maryland) High Court of Chancery, an injunction was granted, restraining the defendant, A, from giving, and the defendants, B and wife, from receiving from A, a preference over his other creditors. Held, that proceedings subsequently instituted by B and wife in the county court as a court of equity, and a decree thereby obtained, giving them such preference, were violations of the injunction, and that the former court had a right to prohibit, by injunction, the execution of such decree, and to treat it, with the proceedings by which it was obtained, as a nullity.⁴

§ 31. An injunction prohibited an assignee for the benefit of creditors from "intermeddling with, receiving, or collect-

¹ *Ogden v. Gibbons*, 4 John. Ch. 174.

² *Williamson v. Carnan*, 1 Gill & J. 184.

³ *Tyler v. Pope*, 4 Edw. Ch. 430.

⁴ *Winn v. Albert*, 2 Md. Ch. Decia 42.

ing" any of the assignor's property. Held, the bringing of an action of trespass against a sheriff, who assumed to take such property out of the possession of the assignee, would not be a violation of the injunction, and therefore the failure to bring it was not excused by the injunction, under the statute of limitations.¹

§ 32. We have already seen (Sect. 3), that an injunction may take effect without any technical formality, where the party has notice. In connection with the point now under consideration, what constitutes a breach of an injunction, it may be here added, that a person is sometimes held not bound to obey an injunction, until after due service thereof on him. And verbal notice that an order has been made is held not sufficient.² (a)

§ 32 a. Want of notice must be distinctly alleged in the answer. Thus, where the petition prays for an injunction to restrain the defendant from paying over money held by him as trustee, and also for a decree that it be paid to the plaintiff; it is not sufficient to allege in the answer that the money had been paid to the *cestui qui trust*, but it must be stated that it was so paid before notice of the injunction.³

§ 33. A defendant and his clerk in court will not be committed for breach of an injunction, notice of which was given to the clerk. He is not an agent for this purpose.⁴ But where notice of the order for an injunction against waste was personally served on the defendant the morning after it was obtained, and it was fully explained to him, and he was insolvent; he was committed for proceeding with the waste. The

¹ *McQueen v. Babcock*, 41 Barb. 337.

² *Hollis v. Border*, 10 Tex. 360.

⁴ *Gooseman v. Dann*, 10 Sim. 518.

³ *Elliott v. Osborne*, 1 Cal. 396.

(a) In reference to notice to the *plaintiff*; violation of an original injunction granted *ex parte*, modified on motion of the defendant, without notice to the plaintiff, on bond by the defendant, is no contempt, as the judge had a right to modify the order by § 334 of the (California) Practice Act. If he erred in so doing, the remedy of the plaintiff is by appeal; he cannot have a mandamus to compel an attachment for contempt. *Fremont v. Merced Mining Co.*, 9 Cal. 18.

Lord Chancellor remarked, that, if the party is in court at the time that the injunction is granted, that is enough ; or even if he is on the outside of the court, and informed by one on the inside.¹

§ 34. Where a husband had been enjoined from *annoying* his wife, it was held that sending her a letter, at the suggestion of her next friend, which was delivered to him unsealed, informing her of the transmission of certain articles for her use, was not a breach of the injunction, though it contained animadversions upon her conduct.² And the mere expression of a wish to the wife, to have his children back, was held not to be *claiming* them, within the terms of the injunction, prohibiting him from making such claim.³

§ 35. Where an injunction had been granted, enjoining the defendant from interfering with or incumbering certain lands and premises, and the defendant, at and previous to the granting of the injunction being in possession of and claiming title to a mill on the land, forcibly put out the agents of the complainant, who came into the mill after the injunction had been served, and refused to leave when requested ; it was held to be no violation of the injunction, which was not intended to dispossess the defendant.⁴

§ 36. Where the proprietors of a canal were enjoined from obstructing the use of the towing path, which the public had a right to use as such ; it was held, that obstructions by the defendants to the use of the path for other purposes were not a breach of the injunction, though they had no legal right to make them.⁵

§ 36 a. A late case in England illustrates the point, as to what constitutes violation of an injunction ; including also the party who may be guilty of such violation, and the mode of its punishment.

¹ *Vawsandan v. Rose*, 2 Jac. & W. 264 ; acc. 1 Cal. 396.

² *Lourie v. Lourie*, 9 Paige, 234.

³ *Ib.*

⁴ *Hemmingway v. Preston*, Walk. (Mich.) 528.

⁵ *Bosley v. Susquehanna, &c.*, 3 Bland, 63.

§ 36 b. March 6th, the defendants, a local board of health, were enjoined from causing or permitting sewage, or water polluted therewith, to pass through drains or channels under their control into a river, to the injury of the plaintiff, a miller, residing about three miles below the outfall of the defendants' works. Execution of the order was stayed till July 1. Subsequently to that date, they did not comply with the order, but alleged that they had not discovered a mode of deodorizing the sewage; that the order could not be obeyed without stopping the drainage of the town, which would subject them to hostile proceedings at law and in equity, and compel violation of an act of Parliament; that there had been no wilful default, and a sequestration would be ineffectual, their property being all public property, injurious to the public, by preventing them from fulfilling their duties, and futile, as it would compel the members to resign. Held, a gross and wilful contempt, and sequestration was ordered to issue. Sir W. Page Wood, V. C., in very strong language repudiates the theory, advanced for the defendants, of any distinction in a case of this nature between a single individual and a public body. Referring to a prior case of like kind, he remarks, — "In the case of the Birmingham Local Board of Health, I was told that the large and important town of Birmingham would be stifled and smothered, and perhaps subjected to pestilence, if the board were not allowed to discharge the whole of their sewage into the river, on which a private gentleman, the plaintiff, had certain rights of fishing, as well as of sending his cows to drink, and other benefits of that kind. But it appeared to me quite plain from the act of Parliament that they had no right to discharge their sewage into the river; and I did not in the least regard the circumstance of their acting for one hundred thousand people. What difference can it possibly make as to the commission of an illegal act, whether a man acts on behalf of thousands or on behalf of himself only." The vice-chancellor proceeds to consider the circumstances of the case, upon the supposition of an individual defendant. "Suppose a man, for his own convenience, for the purpose of getting rid of his own sewage, something that annoys him, throws it into his neighbor's yard,

or into his neighbor's river, and that he is ordered by the court not to permit the sewage under his control to pass into his neighbor's river, to his annoyance. Suppose that he afterwards comes here, telling the court that he has consulted most eminent chemical authorities, and has done the best he can during a long continuance of inquiry, but that he has found out there is no possible mode by which he can deodorize the sewage, or at least that he has not yet arrived at or discovered it, and therefore that he has not ceased to pour that sewage into the river or upon his neighbor's property; that he pours it into the river because he does not find it pleasant or agreeable to retain it; that he means to continue to pour it into the river until he shall find out something that will deodorize it; and then asks the court to stay its proceedings until that is done. Would not that be a most outrageous breach of the order, and a flagrant contempt, for which the only proceeding the court could take, would be to order committal? The simple and only view is, that an order must be obeyed, and that those who wish to get rid of that order must do so by the proper course, an appeal. So long as it exists, the order must be obeyed, and obeyed to the letter; and any one who does not obey it to the letter is guilty of committing a wilful breach of it, unless there be some misapprehension which all mankind are subject to, and which may mislead him upon the plain reading of the order. What created the evil was what was done by those gentlemen, and those who created the evil must remove it. It is not for me to say how they are to do this. They must take their own steps."¹

§ 37. Mere notice to the sheriff of the injunction is sufficient, and if he afterwards proceeds it is a contempt.² And to a bill, to enjoin execution creditors from proceeding to enforce their executions, the sheriff is not a necessary party. Notice to him of the order for an injunction is sufficient.³ So an injunction, restraining the levy of an execution, precludes the creditor from placing it in the officer's hands, though no

¹ *Spokes v. Banbury, &c.*, Law Rep. (Eng.) Eq. January, 1866, p. 41, pp. 46, 47, 50.

² *Edney v. King*, 4 Ired. Eq. 465.

³ *Hext v. Walker*, 5 Rich. Eq. 5.

sale is made.¹ So, after the first proclamation under a writ of *exigi facias*, a common injunction was issued. The sheriff applied to the judgment creditor's solicitor for instructions, but the solicitor declined to give any. The sheriff then made three of the remaining proclamations. Held, the creditor was guilty of a contempt, punishable by costs, though not by a commitment.²

§ 38. After service of the ordinary injunction in a creditor's suit, the defendant is not guilty of contempt, by proceeding to judgment in a suit previously commenced.³ So it is not a violation of an injunction, restraining a party from suing the executors, or other representatives of the testator, to sue the heirs.⁴ But a judgment debtor, after the issuing of an injunction in a creditor's suit upon the judgment, will incur a contempt, by applying money previously earned, or in his possession at the time of the service of the injunction, to the payment of other debts, though small, and contracted for family supplies.⁵

§ 39. Where a party, against whom judgment had been rendered, was enjoined against interfering with or disposing of his property until a receiver was appointed, and confessed judgment in another case begun after the first, and with intent to delay the payment to the plaintiff in the first suit, and made an assignment to the receiver appointed in the second suit; he was held to be guilty of contempt, and was fined to the amount of the first plaintiff's costs and judgment.⁶

¹ *Sugg v. Thrasher*, 30 Miss. 135.

² *Woodley v. Bodington*, 9 Sim. 214.

³ *Parker v. Wakeman*, 10 Paige, 628.
485.

⁴ *Dale v. Rosevelt*, 1 Paige, 35.

⁵ *Taggard v. Talcott*, 2 Edw. Ch.

⁶ *Ross v. Clussman*, 3 Sandf. 676.

CHAPTER V.

INJUNCTION OF JUDGMENTS AND EXECUTIONS.

1. *Rehearing* in law and equity ; new trial, &c. ; history of the law relating to injunction of judgments.
2. An *inequitable* judgment may be enjoined. But special grounds must be shown ; in general, one court will not interfere with the action of another.
- 5 a. *Amount* of judgment, as affecting injunction.
10. Injunction of a judgment in another State.
11. Terms of granting an injunction.
22. *Successive* injunctions.
- 22 a. The plaintiff must show diligence, and disprove neglect on his own part ; *laches* ; omission of defence at law ; pleadings must show diligence.
30. Exceptions to the general rule ; surprise, accident, mistake, newly discovered evidence.
36. Injunction in case of fraud ; want of consideration.
41. Formal errors.
45. Form and mode of judgment ; judgment by default, confession, warrant of attorney, &c.
53. Effect of *appearance* in the suit at law.
55. Injunction in case of compromise or award.
57. Injunction of a judgment in part.
63. In case of payment.
69. Of bankruptcy.
- 69 a. Of set-off.
- 74 a. General rule as to the *estoppel* of the former judgment.
81. Pleadings upon a bill for injunction of a judgment.
86. Parties.
104. Appeal.
105. Trial by jury.
106. Questions of jurisdiction.
107. Judgments in reference to *title*.
111. In case of *sureties*.
112. Of trusts.
113. Miscellaneous cases.
122. Injunction of *executions* ; general rules.
125. Where a levy or sale would cause a *cloud upon the title* of the complainant, or cause irreparable damage. Cases of conflicting claims to the property.
129. In case of fraud, actual or constructive.
130. In case of payment, in whole or in part.
- 134 a. In case of set-off.

135. Want of redress at law ; want of diligence ; notice, &c.

139. Parties.

142. Injunction in case of *successive* executions.

144. Miscellaneous points.

§ 1. It will be seen hereafter, that the process of injunction is often resorted to, like other legal remedies, by reason of an alleged wrongful act, *in pais*, or independent of any legal sanction, of one person, causing injury to another. There is, however, another and a very frequent occasion for its exercise, in restraining the enforcement by action at law of a pretended legal claim. In this application, injunction bears a very close resemblance to a *new trial* or other mode of *rehearing* in a court of law. More especially, the remedy of *new trial*, in its modern enlargement by judicial construction and express statutory provision, partakes largely of equitable considerations, and has therefore to some extent superseded the nominally and exclusively equitable remedy of injunction. In two particulars, however, these remedies are clearly distinguishable, and the former is no substitute for the latter. Ordinarily, a new trial must be applied for *before judgment*, while injunction may overrule a judgment or even an execution. And, in addition, contingencies are constantly occurring, where even the liberal redress afforded by the motion for a new trial, in its modern application, would leave a party remediless, but for the still broader equitable and summary interposition of a court of chancery.¹ (a)

¹ See Hilliard on New Trials, chap. 18 ; Franklin v. Greene, 2 Allen, 519.

(a) Upon this subject, a late case decides the following points : The power of a court of equity to look into, and on the ground of fraud to relieve against, the judgments of other courts, is well established. *Tomkins v. Tomkins*, 3 Stockt. 512. Where the judgment has been procured by artifice or concealment, and the court where the fraud has been perpetrated cannot afford adequate relief, the court will prevent the fraudulent party from using his judgment to the injury of his adversary ; or, if he has enforced it, will hold him as a trustee and compel him to account. *Ib.* The court will relieve against the fraudulent use of a *bond fide* judgment, against awards fraudulently obtained, against verdicts and probates of wills, and even against private legislative acts obtained by fraud. *Ib.* So in a case of foreign attachment, where the proceeding is *in rem*, and the judgment obtained without the defendant's knowledge, and the proceedings are all necessarily *ex parte*. *Ib.* But even where a judgment has been obtained in the absence of a party, and upon a hearing entirely *ex parte*, equity will not try over again the merits of a case, if they have been properly submitted to the proper

§ 1 a. Judge Story remarks, in reference to the history of the law upon this subject: "Injunctions to *stay proceedings at law* are sometimes granted to stay trial; or, after verdict, to stay judgment; or, after judgment, to stay execution; or, if the execution has been effected, to stay the money in the hands of the sheriff; or, if part only of the judgment debt has been levied by a *fi. fa.*, to restrain the suing out of another *fi. fa.*, or a *ca. sa.*, according to the exigency of the particular case. The common mode, in which this relief was granted, was, after a judgment at law, by enjoining the plaintiff not to sue out execution upon the judgment. This was supposed to trench upon the jurisdiction of the courts of common law from its tendency to destroy the conclusiveness, and to make nullities of their judgments; since an execution is properly said to be *fructus, finis, et effectus legis*; and, therefore, is the life of the law. The exercise of this jurisdiction, however, can be distinctly traced back to the beginning of the reign of Henry the Seventh, and although it was constantly struggled against, and even constituted one of the articles of impeachment against Cardinal Wolsey in the reign of Henry the Eighth, yet it was constantly upheld by the chancellors, and was finally and conclusively established in the reign of King James in the manner already mentioned."¹

§ 1 b. Another late work gives the following account of the interference of a court of equity with the *judgment* only.

§ 1 c. "This subject was the cause of a warm contention between Lord Ellesmere and Lord Chief Justice Coke; the former insisting that courts of equity had jurisdiction, not indeed to overrule the judgments of courts of law, but to prevent a person who had obtained a judgment at law, contrary to equity, from making the courts of law instruments of injus-

¹ Story's Eq., 3d ed., sect. 874. See *Coit v. Haven*, 30 Conn. 190.

legal tribunal. *Ib.* If the plaintiff imposes a fictitious or satisfied claim upon the auditors, or if he conceals from them any fact tending to show that his claim is not valid, he commits a fraud upon the absent party; and this court will either enjoin the enforcement of the claim at law, or, if the judgment is executed, will compel a just restitution. *Ib.*

tice ; the latter contending, on the other hand, that an injunction to stay proceedings in the courts of common law was an encroachment upon their jurisdiction, and a violation of the statute law of the land. The following is the account given by Mr. Hallam of the dispute between Lord Ellesmere and Lord Coke. ‘It happened,’ he relates, ‘that an action was tried before Coke, the precise circumstances of which do not appear, wherein the plaintiff lost the verdict in consequence of one of his witnesses being artfully kept away. He had recourse to the Court of Chancery, filing a bill against the defendant to make him answer upon oath, which he refused to do, and was committed for contempt. Indictments were upon this preferred at Coke’s instigation against the parties who had filed the bill in chancery, their counsel and solicitors, for suing in another court after judgment obtained at law, which was alleged to be contrary to the statute of Premunire. But the grand jury, though pressed, it is said, by one of the judges, threw out these indictments. The king, already incensed with Coke, and stimulated by Bacon, thought this too great an insult upon his chancellor to be passed over. He first directed Bacon and others to search for precedents of cases where relief had been given in chancery after judgment at law. They reported that there was a series of such precedents from the time of Henry VIII., and somewhere the chancellor had entertained suits even after execution. The attorney-general was directed to prosecute in the Star Chamber those who had preferred the indictments, and as Coke had not been ostensibly implicated in the business, the king contented himself with making an order in the Council Book, declaring the chancellor not to have exceeded his jurisdiction.’ ”¹

§ 1 d. In the present chapter we propose to consider injunctions of *judgments* and *executions*.

§ 2. It is said, in an old case : “ When a judgment is obtained by oppression, wrong, and a hard conscience, the chancellor will frustrate it and set it aside, not for any error or

¹ 1 Hall. Const. Hist. 472 ; 3 Lead. Cas. in Eq. 160.

defect in the judgment, but for the hard conscience of the party.”¹ And the general rule is laid down, that equity will grant relief against a judgment, which is against conscience, or the justice of which can be impeached by facts, or on grounds of which the party could not avail himself at law, or of which he was prevented from availing himself by fraud, accident, mistake, or the act of the opposite party, without any negligence or fraud on his own part.² (a) So equity will prevent the inequitable use of a good judgment.³

¹ Per Lord Ellesmere, Oxford's Case, 1 Ch. Rep. 1; Toth. 126.

² Kent v. Ricards, 3 Md. Ch. Decis. 392; Marine, &c. v. Hodgson, 7 Cranch, 332; Jarvis v. Chandler, 1 Turn. & R. 319; Lamb v. Anderson, 1 Chand. 224;

Rowan v. Runnels, 5 How. 134; Moore v. Gamble, 1 Stockt. 246; Pollock v. Gilbert, 16 Geo. 398; Little v. Price, 1 Md. Ch. Decis. 182.

³ Garlick v. McArthur, 6 Wis. 450.

(a) It is said, equity cannot set aside the judgment of a court of law, and grant a *new trial*. (See § 4.) It cannot act upon the *case*, but may upon the *person*, and so might well decree that, unless he consents to have the judgment set aside and a new trial awarded, he shall be perpetually enjoined from executing it. Pelham v. Moreland, 6 Eng. 443. See Pickins v. Yarborough, 30 Ala. 408. But, on the other hand, it is held competent to a court of chancery to grant a new trial in an action at law, and to restrain the prevailing party from enforcing his judgment, where it is against conscience to enforce it, and where the other party had no opportunity to make defence, or was prevented by accident, fraud, or improper management, and without any fault on his own part. Carrington v. Holabird, 19 Conn. 84. Though, as elsewhere remarked, “applications to this court for a new trial, after a verdict at law, are very rare in modern times, since courts of law exercise the same jurisdiction and to the same liberal extent.” Smith v. Lowry, 1 John. Ch. 223. Where a party's remedy is *purely equitable*, he loses nothing by suffering judgment at law to go against him. Clifton v. Livor, 24 Geo. 91. The chancellor has power, on a bill filed for that purpose, to enjoin proceedings at law *before a justice of the peace*, and compel a discovery of facts, to be used upon the trial at law before the justice. Semple v. Murphy, 8 B. Mon. 271. Equity will relieve against a judgment at law upon a void contract, although the defence might have been made at law. Lucas v. Waul, 12 S. & M. 157. Where a case has been determined at law; that a party is without redress at law, and that the time to petition for a new trial has elapsed, forms no substantive ground for relief in equity. Burton v. Wiley, 26 Vt. 430. Where it was left at the choice of counsel, in a court of law, to take judgment for nominal damages, or have the case sent back for a new trial, and from a misapprehension of the facts the judgment was taken, and would be liable to do the party injustice, and the time to petition for a new trial had elapsed; held, a bill in chancery for a new trial would not be sustained. *Ib.* A party failing in his application at law for a new trial will not be relieved in equity, at least upon the same merits already discussed, and fully within the discretion of a court of law. Wells v. Wall, Oreg. 295.

§ 3. But, on the other hand, it is said: "The general rule is, that this court will not relieve against a judgment at law on the ground of its being contrary to equity, unless the defendant below was ignorant of the fact in question, pending the suit, or it could not have been received as a defence. There may be cases, perhaps, in which this general rule would be subject to some modification."¹ And the general doctrine is laid down, that courts of equity reluctantly interfere to restrain proceedings had in courts of law, and especially after judgment.² That a court of chancery will not interfere with a judgment at law, unless some special ground for relief is shown.³ More especially where the relief sought is predicated on a defence equally available at law.⁴ That, where a party is sued in a court of law, having exclusive jurisdiction of the subject-matter, he must make his defence there, and cannot resort to equity for relief, unless he is hindered or prevented from making such defence.⁵ And that, before equity will grant relief, three things must concur: ignorance of the defence when the judgment was rendered, diligence on the part of the complainant, and that adequate relief cannot be had at law.⁶ On the one hand, a judgment, regular on its face, cannot be enjoined, unless a defence is shown.⁷ While, on the other hand, an injunction will not lie against a judgment and execution void on their face. And a complaint so alleging, though adding the insolvency of one defendant, is bad.⁸ So equity will not enjoin a judgment merely for defect of jurisdiction;⁹ or for irregularity, or want of service, unless substantial injustice has been done.¹⁰ So it is held that equity will not relieve against a judgment at law, except for fraud, accident, surprise, or manifest injustice, unmixed with fault or negligence on the complainant's part.¹¹ A party seeking

¹ *Lansing v. Eddy*, 1 John. Ch. 50; *Dunham v. Downer*, 31 Verm. 249.

² *Marsh v. Edgerton*, 1 Chand. 198.

³ *Lockard v. Lockard*, 16 Ala. 423; 17 *Ib.* 672.

⁴ *Foster v. The State Bank*, 17 Ala. 672.

⁵ *Jamison v. May*, 8 Eng. 600; *White v. Cahal*, 2 Swan, 550.

⁶ *Taylor v. Sutton*, 15 Geo. 103; *Hendrickson v. Hinchley*, 17 How. 443.

⁷ *Taggart v. Wood*, 20 Iowa 236.

⁸ *Sanchez v. Carriaga*, 31 Cal. 170.

⁹ *Stokes v. Knarr*, 11 Wis. 389; 10 Iowa 131.

¹⁰ *Coon v. Jones*, 10 Iowa 131; *Abbecman v. Roth*, 12 Wis. 81.

¹¹ *Dutil v. Pacheco*, 21 Cal. 438; *Pearce v. Chastain*, 3 Kelly, 226; *Phelps v. Peabody*, 7 Cal. 50; *Rice v. Railroad Bank*, 7 Humph. 39.

to enjoin a judgment must show that the plaintiff had no cause of action,¹ or that he had a meritorious defence to the suit.² That a defence which he failed to make would have been available.³ That the judgment is clearly contrary to equity and good conscience.⁴ Equity will not enjoin a judgment merely on the ground of *error*.⁵ (See § 4.) As where, in an action at law for breach of a contract, the breach assigned was the removal of certain machinery, which, by the terms of the contract, the defendant was bound to leave on the premises; and the defendant offered to prove that the contract was rescinded by mutual consent, and that the plaintiff agreed to allow the defendant to remove the machinery; and the court held the evidence inadmissible, whereby a verdict and judgment passed against the defendant.⁶ So it is held, that a judgment at law cannot be impeached *collaterally* in equity.⁷ A court of chancery cannot enter into a case which has been already investigated in a court of law, according to the ordinary rules of investigation in such courts, merely on the ground that injustice has been done. Or that the judgment was obtained through the erroneous statement of witnesses. Or on the ground of error in law, committed by the law court. Or that the complainant was deprived of his defence at law by the court's admitting parol proof of a judgment.⁸ And a party has no right to enjoin the execution of a judgment, absolute and unconditional as to the matters it professed to decide, during a litigation as to other matters in controversy reserved by the judgment.⁹ Thus a bill in equity brought to enjoin a judgment upon a promissory note, where there is no allegation that adequate relief could not be had at law, or that by the contrivance or unfairness of the defendant a remedy was not had at law, and nothing from which the court can infer that a discovery is necessary; contains no

¹ Huebschman v. Baker, 7 Wis. 542.

² Way v. Lamb, 15 Iowa, 79.

³ 23 Verm. 720.

⁴ Wright v. Eaton, 7 Wis. 595; 1 Stockt. 246; Bradley v. Richardson, 23 Verm. 720; 11 Wis. 389; 10 Iowa, 131; 12 Wis. 81.

⁵ Dann v. Fish, 8 Blackf. 407.

⁶ Stockton v. Briggs, 5 Jones, Eq. 309.

⁷ Redwine v. Brown, 10 Geo. 311.

⁸ Vaughn v. Johnson, 1 Stockt. 173.

See Ellis v. Gosney, J. J. Mar. 346; Bantly v. Dillard, 1 Eng. 79; Hempstead v. Watkins, Ib. 317.

⁹ Hereford v. Babin, 14 La. An. 333.

averments authorizing relief in equity.¹ So equity cannot relieve against a verdict for being contrary to equity, unless the former plaintiff knew the fact to be different from what the jury have found it, and the defendant was ignorant of it at the time of trial; or where effectual cognizance cannot be taken at law; or where a verdict is obtained by fraud. But not where the party omitted to avail himself of a legal defence.² So, to an action upon promissory notes, the defendant pleaded failure of consideration. Judgment having been rendered against him, he filed a bill in chancery, praying, upon the same ground, that the judgment be enjoined. Held, the contract having been entered into with a full knowledge of all the circumstances, there being no misrepresentation or concealment, which could affect its validity, the petitioner not being a loser by any omission on the part of the payee, and there being other equitable circumstances in the case, the court would not interfere.³ Also, that the petitioner should have averred that he made no defence at law, or have shown such facts as would excuse him for coming into chancery, notwithstanding such defence.⁴ So where property of a debtor, subject to attachment in a suit pending at law, is sold in trust for creditors, and a judgment rendered in the suit, and the creditors institute proceedings in equity to be relieved against the judgment, alleging that it was unduly obtained, and for too large an amount; the court will not inquire merely whether the judgment was just and equitable, as between the parties to it, but only whether it includes claims or demands, not covered by the action, or not due and payable at the commencement of the action, or which, by a proper application of payments, or credits, will appear to have been paid and satisfied, and were not therefore existing legal claims.⁵

§ 4. The restriction upon courts of equity, as to their interference with judgments at law, is sometimes expressed in the proposition, that, unless a necessity exists for it, and a manifest injury would otherwise be done, no court, *other than that ren-*

¹ *Hungerford v. Sigerson*, 20 How. 156.

² *Gathin v. Kilpatrick*, 1 Car. L. R. 534.

³ *Dickson v. Richardson*, 16 Ark. 114.

⁴ *Ib.*

⁵ *Bradley v. Richardson*, 23 Vt. 720.

dering the judgment, has jurisdiction over the execution.¹ Relief against an *erroneous* judgment at law cannot be granted by the chancellor.² (See § 3.) If a defendant wishes to avoid the effect of a judgment improperly rendered against him, he should apply to the court in which it was rendered; and, if he does not so apply, it seems a court of chancery will not inquire beyond the record, into the means by which the judgment was obtained.³ So, as we have already seen, it is held, with some qualifications, that a court of equity cannot set aside the judgment of a court of law, and grant a party a *new trial*; it cannot act upon the *case*, but may upon the *person*, and so might well decree that, unless he consents to have the judgment set aside and a new trial awarded, he shall be perpetually enjoined from executing it.⁴ And where there is a judgment, and also a *decree*, for the same demand, the collection of the money under the decree cannot be enjoined, unless the complainant allege in his bill that the judgment has been satisfied.⁵ So, to entitle a party to an injunction on the execution of a decree, pending a rehearing, he must present such a state of facts as, if true, would entitle him to a reversal of the decree.⁶ And the proper course to stay proceedings under a decree, for irregularity, is not by a bill of injunction, but by petition to the court.⁷ An original bill for an injunction, by the parties to a former suit, or their privies, will not lie to restrain proceedings under the decree in such suit.⁸ But an injunction, commanding and enjoining one to cease from all proceedings on his judgments recovered at law, was held to operate to restrain him from proceeding in equity.⁹ And it is no objection to an injunction, that it will arrest the execution of a decree, where the applicant has prior rights which he has not lost by laches.¹⁰

§ 5. A case, involving some departure from the strict rules upon this subject, early arose between two States of the

¹ *Donnell v. Parrott*, 13 La. An. 251.

² *Reynolds v. Horine*, 13 B. Mon. 234; *Methodist, &c. v. Mayor, &c.*, 6 Gill, 391.

³ *Hone v. Woolsey*, 2 Edw. Ch. 289.

⁴ *Pelham v. Moreland*, 6 Eng. 443.

⁵ *Dunham v. Collier*, 1 Iowa, 54.

⁶ *Lockett v. White*, 10 Gill & J. 480.

⁷ *Dyckman v. Kernochan*, 2 Paige, 26.

⁸ *Ib.*

⁹ *Little v. Price*, 1 Md. Ch. Dec. 182.

¹⁰ *Apalachicola v. Apalachicola Land Co.*, 9 Florida, 340.

Union, as respectively parties to the suit. The Governor of Georgia brought a bill, on behalf of the State, against A and B, alleging that B, a subject of Great Britain, whose property had been confiscated by the State, was indebted on a bond to A, who had recovered judgment on the bond, on which execution had issued, and prayed for an injunction. Held (by some of the judges, who were not fully agreed in their views of the case), if Georgia had a right to the debt, it was a right to be pursued at common law; but, as the bill was founded in the highest equity, the injunction should be granted, and continued till the next term, and then dissolved, if Georgia had not then instituted her action at law.¹

§ 5 a. The *amount* of a judgment is sometimes viewed as bearing upon the question of injunction.

§ 6. Equity will enjoin a judgment by mistake excessive in amount, though the land of the debtor, upon which execution is levied, was previously conveyed, fraudulently, to defeat the judgment.²

§ 7. For the sums of two dollars and ten dollars chancery will not allow a judgment to be stayed, unless in cases of the grossest fraud.³

§ 8. The question may arise, what shall be included in the injunction.

§ 9. Interest and sheriffs' commissions, on a part of a debt which is enjoined, should be included in the injunction.⁴

§ 10. An injunction may issue against a judgment in one State, on a prior judgment in another, for cause affecting the judgment of the latter.⁵ So it is held in Illinois, that a bill may be filed to enjoin a judgment of one of the courts of the State, recovered upon a judgment in the courts of another

¹ *Georgia v. Brailsford*, 2 Dal. 402, 415; 1 Curt. U. S. 4, 13, 71.

² *Williamson v. Johnson*, 1 Halst. Ch. 537.

³ *Yantes v. Burdett*, 3 Mis. 457.

⁴ *Greathouse v. Lord*, 1 Dana, 105.

⁵ *Wilson v. Robertson*, 1 Overton, 266.

State, if the party has not been guilty of any laches in the assertion of his rights, and the judgment of the foreign court has been reversed.¹ So equity will restrain the use of an advantage gained in a court of ordinary jurisdiction of another State by fraud, accident, or mistake.² Thus A, a manufacturing company in the State of Connecticut, having had dealings with B, a dealer in New York; C, as the agent of A, purchased a quantity of iron of B, B knowing that A was the party with whom he was contracting. Afterwards B brought a suit for this iron, against C individually, in the Superior Court of the city of New York, and process was duly served on C, by arresting his body. Soon after the suit was instituted, C called on D, the attorney of B, and explained to him the circumstances under which the contract was made, and the mistake in suing him individually, instead of A, his principal. D said to C, that he would see him again on the subject. This D did not do; but he shortly after wrote C a letter, informing him that nothing would be done in relation to that suit, until further notice should be given him. C, relying on this communication, and hearing nothing further from D or B, did not appear, in person or by attorney, before the court to which the process was returnable; but D appeared, and obtained a judgment against C without his knowledge. The record stated, that on the first Monday of April, 1846, came, as well the plaintiff, by his attorney, as the defendant, in his proper person; and the defendant defends the wrong and injury, and says nothing in bar or preclusion of said action; wherein the plaintiff remains therein undefended against the defendant. In November, 1848, B brought, in Connecticut, an action of debt on the judgment, during the pendency of which, C filed his bill to restrain B from enforcing his judgment. Held, 1. That the taking of judgment operated as a surprise upon C, tantamount to a fraud, and justly called for the interposition of a court of equity, unless prevented on the ground of some technical objection; 2. That the "full faith and credit" required by the Constitution of the United States, and the law of Congress, to be given to the judicial proceedings of other States, did not preclude such interposition, inasmuch as a court of equity here

¹ *McJilton v. Love*, 13 Ill. 486.

² *Pearce v. Olney*, 20 Conn. 544.

does not impugn the New York judgment, but considers the equities subsisting between the parties and acts upon them personally, restraining the one from pursuing a judgment so obtained, and protecting the other ; 3. That the record of the New York judgment, finding that the defendant “appeared, in his proper person, and said nothing in bar or preclusion of said action,” does not necessarily conflict with the facts above stated, inasmuch as the plaintiff in that suit might, under the laws of New York, have obtained a judgment and had a record made, like the judgment and record in question, without any actual appearance of the defendant.¹ (a)

§ 11. With regard to the *terms* upon which a judgment will be enjoined ; it is held that, where a judgment debtor comes into equity for protection, on the ground that he has satisfied the judgment, the door is fully open for the court to modify or grant his prayer, upon such conditions as justice demands.²

§ 12. An injunction to a judgment at law will, in general, be at the cost of the complainant.³

§ 13. Unless in aid of a suit at law, it is held that no injunction should be granted, where the applicant for it does not submit to a judgment at law, as he cannot contend at law and in chancery at the same time.⁴

¹ *Pearce v. Olney*, 20 Conn. 544.

³ *Mosby v. Haskins*, 4 Hen. & M. 427.

² *Mechanics', &c. v. Lynn*, 1 Pet. 376.

⁴ *Conway v. Ellison*, 14 Ark. 360.

(a) Different *local* rules prevail in different States, with reference to the enjoining of judgments. In Texas, an injunction to stay execution should be directed to the District Court of the county in which judgment was rendered. *Hendrick v. Cannon*, 2 Tex. 259. In Kentucky, where A and B obtained judgments against each other in different counties ; held, the chancellor of the county in which the defendant lived might enjoin one judgment, and set it off against the other. *Mitchell v. Stewart*, 4 J. J. Marsh. 551. But a judgment in the Circuit Court of one county cannot be enjoined by the Circuit Court of another. *Lamaster v. Lair*, 1 Dana, 109. In Ohio, an injunction cannot be issued by the Court of Common Pleas, to restrain an execution of the Supreme Court, upon a decree of alimony. The remedy is by application to the Supreme Court on return of the execution. *Sample v. Ross*, 16 Ohio, 419. In Missouri, injunction of a judgment must generally be in the same county where it was rendered. But it is otherwise if the judge of that county is disqualified. *State v. Price*, 38 Mis. 382.

§ 14. An order for injunction to a sale under execution is not effectual, until the execution of the bond required by the order.¹

§ 15. In North Carolina, under the statute of 1800, before a judgment will be enjoined, the amount of it must be paid to the clerk of the court.²

§ 16. The statute of New Jersey (Rev. Laws, 704, § 6), which directs an injunction to stay proceedings in a personal action at law, after verdict and judgment, on application of the defendant, unless the money be first paid into court, applies to bills of interpleader.³ The statute is not confined to proceedings in the suit in which the judgment is recovered.⁴ So it applies, where an injunction is prayed by the defendant in a judgment, to restrain proceedings by foreign attachment to enforce the judgment.⁵

§ 17. In Maryland, an injunction may be granted to stay execution, in some cases, without bond.⁶

§ 17 a. In Texas, a debtor who seeks an injunction against a void judgment is not obliged to bring money into court.⁷

§ 18. In New York, on a bill to restrain proceedings at law upon a judgment, the plaintiff will not be ordered to pay the amount of the judgment into court, unless there is danger of his insolvency.⁸ And where a creditor's bill charged that the defendant, pending a suit at law by the plaintiff, confessed judgment to another person, for a debt not due, and which was fully secured; an injunction to stay proceedings upon the judgment was granted, without a deposit of security by the plaintiff.⁹

§ 19. A purchaser, who shows no sufficient reason for not

¹ *Pell v. Lander*, 8 B. Mon. 554.

² *Pugh v. Maer*, 4 Hawks, 362.

³ *Morris, &c. v. Bartlett*, 2 Green, Ch. 9.

⁴ *Kinney v. Ogden*, 2 Green, Ch. 168.

⁵ *Ib.*

⁶ *Cape, &c.*, 3 Bland, 606.

⁷ *Edrington v. Allsbrooks*, 21 Tex. 186.

⁸ *Rodgers v. Rodgers*, 1 Paige, 426.

⁹ *Burns v. Morse*, 6 Paige, 108.

making his defence at law, and seeks equity for relief, must be governed by the general rule on this subject, to submit to take a title at the hearing, and complete his purchase.¹

§ 20. In a suit to enjoin the collection of a judgment, the complainant gave a bond for the exact amount of the judgment, conditioned to pay when ordered by the Superior Court. Held, the sureties were bound only for that sum.²

§ 21. To obtain an injunction against a judgment, on the ground that the complainant cannot safely pay it, there being several claimants, he should file a bill of interpleader, and pay the debt into court for the party showing himself entitled thereto.³

§ 22. In some cases there may be *successive injunctions* to the same judgment. Thus, after the dissolution of one injunction, another was granted to the same judgment, and made perpetual, it appearing that the contract in question, though not tainted with fraud, was founded in a mistake of both parties in relation to the existence of a fact of which both parties were ignorant, and which was not known to the complainant until after the first injunction was dissolved.⁴

§ 22 a. As in other cases, a party who would enjoin a judgment must show *diligence* on his own part. *Laches* or negligence will be a bar to equitable relief. (See Chap. I, § 43.)

§ 23. In this point of view, the question of *time* often becomes material in cases of this nature.

§ 24. Delay in an application for relief against a judgment furnishes a presumption against the equity of the proposed defence.⁵

§ 25. Thus, after a verdict for the plaintiff on a bond, equity will not order an account of transactions which are old and

¹ McLaurin v. Parker, 24 Miss. 509.

² Dickerson v. Cook, 3 Duer, 324.

³ Fowler v. Lee, 10 Gill & J. 358.

⁴ Armstrong v. Hickman, 6 Munf. 287.

⁵ Bartlett v. Glendy, 3 Mis. 345.

stale, although occurring, in part, subsequently to the making of the bond, for the purpose of obtaining a discount.¹ So equity will not disturb a judgment by default, upwards of twenty years old, and an execution title to real estate vested under it, for want of notice of a writ attaching the defendant's real estate, when he was openly at large within the State; the facts having come to his knowledge about seventeen years before the filing of his bill for relief; the sole excuse for the delay to proceed being, that the complainant had no evidence of the facts upon which he relied for relief, until the passage of a recent statute enabling parties to be witnesses for themselves in civil cases; and the purchaser under the execution having, in the mean time, built upon and improved the estate.²

§ 26. In a suit to stay proceedings at law, a defendant obtained time to answer, and then pressed on the action and obtained judgment. After a very considerable delay, he again applied for further time to answer; but it was held, that, as he came for an indulgence, it could only be granted upon the terms of staying execution in the action.³

§ 27. In North Carolina, the statute, providing that an injunction upon a judgment at law shall not issue more than four months after the rendition of judgment, does not apply, where the ground of the application did not exist when the judgment was rendered.⁴

§ 27 a. The requisition of *diligence* finds another application in the rule already adverted to, as to the conduct of the complainant in the suit at law in which the judgment was rendered.

§ 28. It is an all-important principle, that a judgment, erroneous simply because the defendant or his attorney neglected to make a defence which he could have made, in the absence.

¹ *Randolph v. Randolph*, 1 Hen. & M. 181.

² *Briggs v. Smith*, 5 R. I. 213.

³ *Zulueta v. Vinent*, 21 Eng. Law & Eq. 581.

⁴ *Kerns v. Chambers*, 3 Ired. Ch. 576.

of surprise, accident, mistake, or fraud, will not be enjoined. And it is held to be sufficient ground of refusal, that the bill itself shows a good defence.¹ So where the defendant might have had all the relief he was entitled to, upon an application in the original action, which he neglected to make, he cannot have an injunction.² Thus if he could have had the judgment opened; even though the claim was unconscientious.³ So where a party moved for a new trial on the ground of surprise, and for other causes examinable at law; the motion being denied and no exceptions taken, the Court of Chancery has no jurisdiction to grant relief.⁴ Thus it is no sufficient excuse for not making a defence at law, so as to give chancery jurisdiction, that a creek, which had to be crossed to get to the court-house, was so swollen by rains, on the first day of the court, that it could not be crossed, and so continued for three days; it not being shown on what day the court adjourned, or when the judgment was rendered, and no effort having been made to get to the court-house after the flood subsided.⁵ So equity will not relieve against a judgment at law, because the attorney who conducted the defence, through ignorance or design, managed the case unskillfully. Nor because the complainant was deprived of the benefit of a defence, pleaded by him in the suit at law, in consequence of another plea subsequently filed by his counsel.⁶ So a garnishee, who had discharged the judgment, being sued on the original debt, for the use of another, employed, as counsel to defend the suit, the same attorneys

¹ *Jordan v. Thomas*, 34 Miss. 72; *Todd v. Fish*, 14 La. An. 13; *Gibson v. Moore*, 22 Tex. 611; *Kriechbaum v. Bridges*, 1 Clarke, 14; *Champion v. Miller*, 2 Jones, Eq. 194; *Vaughn v. Fuller*, 23 Geo. 366; 2 Fairf. 218; *Rogers v. Kingsbury*, 22 Geo. 60; *Carter v. Bennett*, 6 Florida, 214; *Jones v. Kilgore*, 2 Rich. Eq. 63; *Pearce v. Chastain*, 3 Kelly, 226; *Brandon v. Green*, 7 Humph. 130; *Meek v. Howard*, 10 S. & M. 502; *Methodist, &c. v. Mayor, &c.*, 6 Gill, 391; *Conway v. Ellison*, 14 Ark. 360; *Little v. Price*, 1 Md. Ch. Dec. 182; *Williams v. Jones*, 10 S. & M. 108; *Semple v. McGatagan*, 10 S. & M. 98; *Faulkner v. Campbell*, 1 Morris, 148; *Miller v. McGuire*, 1 Morris, 150; *Paynter v. Evans*, 7 B. Mon.

420; 12 Tex. 4; *Shipp v. Wheelless*, 33 Miss. 646; *Donnell v. Parrott*, 13 La. An. 251; *Walker v. Robbins*, 14 How. 584; *Bellamy v. Woodson*, 4 Geo. 175; *Duncan v. Lyon*, 3 John. Ch. 351; *Trevor v. McKay*, 15 Geo. 550; *Skinner v. Deming*, 2 Cart. 558; *Bruner v. Planters' Bank*, 23 Miss. 406; *Scroggins v. Howorth*, 23 Miss. 514; *Basye v. Beard*, 12 B. Mon. 581; *Prewitt v. Perry*, 6 Tex. 260.

² *Borland v. Thornton*, 12 Cal. 440; *Snyder v. Vannoy*, 1 Oregon, 344.

³ *Ib.*

⁴ *Hendrickson v. Hinkley*, 5 McLean, 211; *Champion v. Miller*, 2 Jones, Eq. 194.

⁵ *English v. Savage*, 14 Ala. 342.

⁶ *Burton v. Hynson*, 14 Ark. 32.

who had obtained the judgment against him as garnishee, but did not inform them of his defence, in consequence of which a second judgment was rendered against him for the same debt. Held, this was gross negligence, and chancery could not relieve him.¹ So A, a garnishee, appeared and answered, and was charged. He was afterwards garnished again on the same account, and paid the amount due to the plaintiffs in the second suit. Bill in equity to enjoin a suit on the former judgment, on the ground that A did not know of the first suit, when he paid the other judgment, and that he supposed the proceedings would have been returned to the District Court for final action. It appeared that the agent of A, in his absence, was informed of the judgment by the justice. Held, A was guilty of negligence in not attending to the suit, and the injunction was refused.² And an injunction will not be granted, where a defendant has not used due diligence in applying to chancery for a *discovery* to assist his defence at law.³ Or where he neglected to prosecute a *certiorari* in season.⁴ Or where he has a perfect remedy by a cross-action, for breach of warranty of the article, for the price of which the original suit was brought; or has any other adequate remedy.⁵ He must show that he has a good defence, of which he had no knowledge until after judgment, or that he was prevented from using it by fraud or accident, or the act of the adverse party, unmixed with negligence or fault on his part.⁶ So any defence, which might be interposed at law to defeat a recovery upon a contract, or a portion of it, must be so interposed, or it is concluded by the judgment.⁷

§ 29. The same general principle is adopted in reference to the *pleadings*. Thus, though the bill states, that the complainant was ignorant of facts which would constitute a perfect defence to an action at law against him, until after judgment; yet equity will not restrain the collection of the judgment, unless it be further stated, that the complainant

¹ Sanders v. Fisher, 11 Ala. 812.

² Houston v. Wolcott, 7 Clarke, 173.

³ Titcomb v. Potter, 2 Fairf. 218.

⁴ Musgrove v. Chambers, 12 Tex. 32.

⁵ Ponder v. Cox, 26 Geo. 485; Fitzhugh v. Orton, 12 Tex. 4.

⁶ Robbins v. Mount, 3 Kelly, 74;

Brandon v. Green, 7 Humph. 130;

Meek v. Howard, 10 S. & M. 502.

⁷ Day v. Cummings, 19 Vt. 496.

had, before the rendition of the judgment, used due diligence to ascertain the facts necessary to his defence.¹ So it is not sufficient for the complainant to allege, that he was ignorant of the facts on which he relies for defence until long after the rendition of the judgment.²

§ 30. But it is sometimes held, that the same certainty of proof is not required to establish an excuse for not making a defence at law, which would be required to establish the existence of that defence.³ And the general rule above stated does not apply, if the defendant in an action at law, who seeks relief in equity, had a good defence, but his neglect to make it was the result of fraud or accident, or the action of the plaintiff.⁴ As where he was not served with process, had no notice of the suit, and neither appeared, nor authorized any one to appear for him.⁵

§ 30 a. It is another technical form of expressing the same rule already stated, that a bill of injunction will lie to restrain proceedings on a decree obtained by *surprise*.⁶ If a defendant in a judgment did not, when it was rendered, know of certain facts which would have been a valid defence, he is entitled to relief against the judgment.⁷ So it is ground for relief against a judgment on a note, that a written contract, without which the maker could not make his defence at law, had been lost.⁸ Or that a party failed, because of sickness, to file his defence.⁹ So where the garnishee in a process of foreign attachment, in which he had employed counsel, and had appeared and disclosed, and been found not indebted, was served with *scire facias* founded upon that proceeding, and failed to appear, in the erroneous belief that the counsel would, as a matter of course and of professional practice, appear for him in the *scire facias* without a further retainer, and, in consequence, judgment was rendered against him upon default; it

¹ Slack v. Wood, 9 Gratt. 40; Taliaferro v. Branch Bank, 23 Ala. 755.

² 23 Ala. 755.

³ Rice v. Railroad, &c., 7 Humph. 39.

⁴ Watt v. Cobb, 32 Ala. 530; Farmers', &c. v. Ruse, 27 Geo. 391.

⁵ Stubbs v. Leavitt, 30 Ala. 352.

⁶ Gallaway v. Alexander, 8 Leigh, 114.

⁷ Meem v. Rucker, 10 Gratt. 506.

⁸ Vathir v. Zane, 6 Gratt. 246.

⁹ Clifton v. Livor, 24 Geo. 91.

was held that he was not guilty of such negligence as should deprive him of the aid of a court of chancery for the opening of the case.¹ So if the defendant, in an action on a promise, is surprised at the trial, and there are a verdict and judgment against him, he may have relief in equity, though he made no effort to obtain a new trial in the common law court.² So, A and B being partners, A made a loan and took a note in the name of the firm, which was afterwards put in suit by B, who had no knowledge of usury in the note; and it appeared by the declaration that A had parted with all his interest in the note. A, on being called by the defendant at the trial to prove the usury, declined to testify, on the ground that he was still interested in the note. Held, a surprise, which entitled the defendant to relief against the verdict.³ So where one defendant required the testimony of another, he may be relieved in chancery after a judgment at law against him.⁴ So an injunction will be granted, to restrain a landlord from enforcing a judgment for possession for non-payment of rent, if the judgment has been obtained by surprise, upon payment into court of the rent claimed as due.⁵ So where a sheriff made a false return of service, and judgment was rendered without notice or appearance, chancery will enjoin the judgment.⁶ So where a general return of "executed" is made, and the service was by copy, left at the residence of the defendant, in his absence, of which he did not receive notice in time to defend at law; equity will grant a new trial.⁷

§ 31. But an injunction will not be granted against a judgment, for a fact or cause constituting a defence which existed, and was known to the party, before trial.⁸ (See § 28.) And when an injunction to stay a judgment was granted more than six months after it was rendered; and the facts, stated as the ground for an injunction, appeared to have existed and been known to the party when the judgment was rendered: held,

¹ *Day v. Welles*, 31 Conn. 344.

² *White v. Washington*, 5 Gratt. 645.

³ *Post v. Boardman*, 1 Clark, 523.

⁴ *Jordan v. Loftin*, 12 Ala. 547.

⁵ *Forrester v. Wilson*, 1 Duer, 624.

⁶ *Ridgeway v. The Bank, &c.*, 11 Humph. 523.

⁷ *Lapiece v. Hughes*, 24 Miss. 69.

⁸ *Huston v. Dito*, 20 Md. 305; *Prewitt v. Perry*, 6 Tex. 260; *Schroepell v. Shaw*, 3 Comst. 446.

the injunction ought to be dissolved.¹ So a party seeking relief in equity against a judgment at law, on the ground that he was ignorant of his defence until after the rendition of the judgment, must show the exercise of ordinary diligence to discover it, or that he was prevented from employing such diligence by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his own part.² (a) So where the plaintiff in an action at law fails, for want of evidence, as to the identity of the slaves sued for, this is matter to be considered on a motion for a new trial, but is no ground for relief in equity.³ Nor that the complainant was sick at the time of the court; that the witnesses had been directed to be summoned by his counsel, but the subpoena was issued so late that the sheriff could not execute it, and the complainant, by reason of his sickness, could not be present to file an affidavit for a continuance; nor that the contract on which the judgment was founded was usurious; nor that the complainant was an infant when the contract was made.⁴ Nor where counsel was not employed, witnesses summoned, nor other measures of defence taken.⁵ Nor for the death of the original counsel employed in the defence, and the want of familiarity, on the part of the counsel who succeeds him, with the grounds of defence.⁶ So refusal of the judge to continue a cause upon motion, supported by affidavit, presents no sufficient reason, upon application to the same court, for enjoining the judgment; but the party should apply, if at all, to the appellate court.⁷ So chancery will not relieve from a judgment rendered against one as trustee, on the ground that through forgetfulness he failed to attend court and make his disclosure, even though he would have been discharged upon making such disclosure, no fraud being imputable to the other

¹ *Doss v. Miller*, 6 Tex. 338.

² *Perrine v. Carlisle*, 19 Ala. 686.

³ *Pickens v. Yarborough*, 30 Ala. 408.

⁴ *Robb v. Halsey*, 11 S. & M. 140.

⁵ *McCollum v. Prewitt*, 1 Ala. Sel. Cas. 498.

⁶ *Powell v. Stewart*, 17 Ala. 719.

⁷ *Western v. Woods*, 1 Tex. 1.

(a) On the other hand, the duty of inquiry may devolve upon the defendant in the complaint for an injunction. Thus a note overdue was indorsed to A for collection, and the maker pays the indorser. Judgment being recovered by an assignee of the note; held, he should have inquired as to the authority of the assignor, and the judgment was enjoined. *Perry v. Siter*, 37 Mis. 273.

party. Even if, in case of fraud, equity would relieve, except by bill of discovery, while the party could have an *audita querela*.¹ So a bill to set aside a judgment, on the ground that service of process was not made upon the defendant, and that an appearance and plea were entered without his authority, was held to have been properly dismissed ; where the appearance and plea were entered at the direction of a co-defendant, there was a trial on the merits, no fraud was shown, and the bill did not allege that the attorneys appearing were irresponsible, nor show any defence to the suit at law.² So where process of attachment was in fact served, the execution will not be enjoined, on the ground of surprise in obtaining the judgment of condemnation.³ So equity will not relieve against a judgment, on the ground that a witness for the defendant did not testify on the trial to material facts within his knowledge, and as to which he was not examined, when, by proper diligence, the defendant could have ascertained what the witness knew in reference to the matters in controversy.⁴ And it is doubted whether equity will interfere in a case at law, upon the allegation that the verdict was obtained by the testimony of a witness, which was known to be false by the party using it, and which the opposite party had no means of contradicting at the trial, or in time to support a rule for a new trial, and without any allegation that the false witness had been presented for perjury, or has absconded so as not to be answerable to the process of the law.⁵ So equity will not interfere against a judgment at law because a witness, introduced to prove a cash payment, stated that the payment was made in jury certificates. Nor because a witness, offered voluntarily, was intoxicated.⁶ (a)

¹ Warner v. Conant, 24 Vt. 351.

² Harris v. Gwin, 10 S. & M. 563.

³ Peters v. League, 13 Md. 58.

⁴ Powell v. Stewart, 17 Ala. 719.

⁵ Dyche v. Patton, 8 Ired. Eq. 295.

⁶ Governor v. Barrow, 13 Ala. 540.

(a) Late cases distinctly affirm the rule in the text ; that there must be an *equitable* ground for the interference of the court. Reed v. Hansard, 37 Mis. 199. That it should appear clearly and unequivocally that the judgment was wrongfully and fraudulently obtained, without any negligence or fault of the party impeaching the judgment. Johnson v. Lyon, 14 Iowa, 431. That there must be a surprise which could not have been reasonably anticipated. Fowler v. Roe, 3 Stockt. 367. That the party must have used due diligence, exhausted every means, and failed through ignorance of some fact ; or been prevented from

§ 32. Where, through *accident, or mistake* (as well as fraud), a judgment has been entered for an amount, or in terms, not as intended, equity will, on clear proof, give relief.¹ But not where the party was prevented from making his defence at law, by a mistake of law, although a mutual mistake of both parties.² Nor on the ground that his counsel mistook the facts of his defence, if he was present at the trial.³ Nor that the party has mistaken his rights, and so failed to make a defence, which it was competent for him to make at law.⁴ So where a judgment was obtained by default, in consequence of a letter's not being received in season, which was sent by mail by the party to his attorney; this was held not to be such an accident as would warrant the interference of a court of equity, since common prudence would have guarded against it by sending an agent.⁵

§ 32 a. Analogous to surprise and mistake, as a ground of injunction, is the discovery of new evidence since the trial at law. This, however, is a prominent ground of *new trial*, at law, and rarely now furnishes the basis of an application for injunction in equity.

§ 33. After a verdict in an inferior court, which has no power to grant a new trial, chancery will grant relief on the ground of *newly discovered evidence*, where the sum in controversy is sufficiently large to bear the expense.⁶ And where a bill in equity alleged, that an important fact had been discovered since a former decree, without the negligence of the complainant, that by this fact the decree would be changed, and prayed for general relief and for an injunction against part of the former decree; held, the bill should be considered as one of review, though the record of the former case was not made part of it; and that on the prayer relief would be granted, as in a bill of review.⁷

¹ *Katz v. Moore*, 13 Md. 566.

² *Richmond, &c. v. Shippen*, 2 P. & H. (Va.) 327.

³ *Jamison v. May*, 8 Eng. 600.

⁴ *Dickerson v. Board, &c.*, 6 Ind. 128.

⁵ *Essex v. Berry*, 2 Verm. 161.

⁶ *Floyd v. Jayne*, 6 John. Ch. 479.

⁷ *Basye v. Beard*, 12 B. Mon. 581.

availing himself of his defence by fraud, accident, or by the act of the opposite party, unmixed with negligence or fault on his part. *Wells v. Wall*, 1 Oreg. 295; acc. *Hinrichsen v. Van Winkle*, 27 Ill. 334.

§ 34. A part of certain property conveyed by a deed in trust was sold on execution against the grantor, the sheriff taking a bond of indemnity from the judgment creditor. Suit was afterwards brought upon the bond, in the name of the sheriff, for the benefit of the trustee in the bond. The defence was set up, of fraud in the deed, but a verdict was recovered and judgment rendered for the plaintiff. The defendant then files a bill in equity, on the ground of newly discovered evidence, proving the fraud as to some of the debts secured, but not disputing the others, and prays for an injunction to the judgment, a new trial, and general relief. Held, not a ground of new trial, which would not probably afford the proper relief, but that the court would retain the cause, and allow the plaintiff to impeach the deed, notwithstanding the defence at law; that he was entitled to an account of the trust subject, and to have it properly disposed of among the parties in interest; and that, as the deed purported to indemnify one of the parties, as to whom the deed was alleged to be fraudulent, as surety of the grantor for certain debts due to specified creditors, these creditors, as well as those directly secured, and whose debts were not questioned, were necessary parties.¹

§ 35. In a bill to enjoin a judgment on the ground of newly discovered evidence, such evidence should be set forth.² It must not be *cumulative*.³ And it has been sometimes held that equity will not interfere, except in a case of fraud, in behalf of either party, upon the ground of testimony being discovered since the trial, which was unknown to the party at the time of the trial, and which would have materially varied the result.⁴ Such relief will not be granted for newly discovered evidence of payment, where the plaintiff neglected to plead the payment, and to produce witnesses of admissions, by the defendant, of the payment; though the full extent of their testimony was not known to the plaintiff, who, it appeared, had made no inquiry.⁵

¹ Billups v. Sears, 5 Gratt. 31.

² Miller v. McGuire, 1 Morris, 150.

³ Pemberton v. Kirk, 4 Ired. Eq.

178.

⁴ Powell v. Watson, 6 Ired. Eq. 94.

⁵ Floyd v. Jayne, 6 John. Ch. 479.

§ 36. *Fraud* is another ground of injunction.¹ (a) And this, although the party might find a remedy in a court of law; or though he had notice of the judgment in time to appeal, and made an abortive attempt to do so.² A former recovery, pleaded in bar to a bill for relief against a judgment at law, alleged to have been obtained by fraud, will not avail the defendant.³ Thus equity will enjoin a judgment, on the ground that there was a good defence, of which the defendant did not know at the time the judgment was rendered, and that he was entitled to pay the debt in depreciated notes, of which privilege it had been sought to deprive him by fraud and collusion.⁴ And where, after a judgment for A, a nominal party, a fraud is discovered, by which a bill for the enforcement of the judgment by A for B is successfully resisted; this is binding on A and B, and a suit for cancelling the judgment and for perpetual injunction will be sustained. The last suit may be brought by the defendant in the original cause, or his assignees as representing his property, that the cloud upon the property may be dispelled.⁵ So where a party, having a good defence to an action, is prevented, by the gross fraud of the plaintiff in the suit, and others, from setting up that defence, and a judgment is obtained against him, without any negligence or fault on his part; it is a proper case for relief in equity against the judgment; and the persons guilty of the fraud, although not parties to the suit at law, are proper parties to the bill in equity.⁶ So upon a bill in equity, praying that the defendant might be enjoined against enforcing a judgment obtained against the plaintiff in violation of an agreement between them, and without his knowledge, it was found that the de-

¹ See *Munn v. Matlock*, 17 Ark. 512; *Wingate v. Haywood*, 40 N. H. 437.

² *Harris v. Terrell*, 38 Mis. 469; *Nelson v. Rockwell*, 14 Ill. 375.

³ *Easton v. Collier*, 3 Mis. 379.

⁴ *Davis v. Tileston*, 6 How. 114.

⁵ *Monroe v. Delavan*, 26 Barb. 16.

⁶ *Huggins v. King*, 3 Barb. 616.

(a) It is said, in a proceeding to set aside a judgment for *fraud*, the province of equity is to test the conscience of parties, not the legality of the judgment, or to correct the errors of a court of law. *Clapp v. Ely*, 2 Stockt. 178. The *plaintiff* in a former judgment may sometimes be relieved by injunction from the fraud of a third party. Thus, in case of a suit brought by an attorney who is poor and irresponsible, without authority, if the defendant recovers a judgment for costs, such judgment will be perpetually enjoined. *Smyth v. Balch*, 40 N. H. 363.

fendant had never threatened to enforce the judgment, but had refused to discharge it unless the plaintiff would also discharge a claim which he held against him. Held, not a sufficient defence ; the refusal to discharge the judgment being equivalent to a threat to enforce it.¹ So where an owner of personal property, incumbered by liens for more than its value, sold it, under a representation that it was unincumbered, and then obtained a judgment for the purchase-money, the collection of the judgment was enjoined till the incumbrances were removed.² (a)

§ 87. A bill, to enjoin a judgment at law for fraud in the contract on which it is founded, must show that the defence was not made at law, and that the omission to make it occurred without any neglect of the complainant.³ Thus, that a note had been obtained by fraud in the *factum*, while a good defence at law, may afterwards be relied on to restrain the issue of an execution.⁴ So a temporary injunction will not be granted, against a judgment rendered on a promissory note by default, the complainant alleging that the plaintiff and the defendants were relatives, and that the note had been due for a long time, and that this was done to defraud the other creditors ; no defence having been made, because no valid defence existed, and the note being for a valid and valuable consideration.⁵ So A and B, brothers, not being indebted to each other, and for a nominal consideration, mutually agreed that A should convey certain personal property to B. B, by another agreement, stipulated to reconvey the property to A,

¹ *Chambers v. Robbins*, 32 Vt. 552.

² *Poe v. Decker*, 5 Ind. 150.

³ *Parker v. Morton*, 5 Blackf. 1.

⁴ *Partin v. Luterloh*, 6 Jones, Eq. 341.

⁵ *Sohier v. Merrill*, 3 W. & M. 179.

(a) It seems, a decree of the House of Lords, obtained by the fraudulent collusion of both parties, in order to defeat the objects of public justice, or the rights of one of the nominal parties, being an infant, may be questioned even in an inferior court, and an original suit for relief there instituted. Per Lord Cranworth, L. C., *Shedden v. Patrick*, 28 Eng. Law & Eq. 56. It seems, such decree may even be treated as a nullity in the inferior court, and the question will simply be, was it a real judgment or not. Per Lord Brougham, *ib.* It seems, though such decree might perhaps be treated by the inferior court indirectly as a nullity, if the case shows manifest, gross, direct fraud, yet the relief should be sought for in the House in the first instance. Per Lord St. Leonards, *ib.*

or to him in trust for his wife and children. A then agreed to confess a judgment to B, who further agreed to sue out execution, levy it upon the whole estate of A, make purchases to the amount of the judgment, and then convey it to A, or to him in trust for his wife and children. This judgment was confessed, and B died. It was then revived by his administrators. It appeared in fact, and by the answers to a bill filed by A to vacate the agreements and judgment, and procure a reconveyance of the property to himself, that their object, known to both parties, was to hinder, delay, and defraud the creditors of A. Held the complainant was not entitled to relief in equity.¹

§ 38. In reference to the question of *consideration*, it is held to be against conscience to collect the amount due on a note, when nothing has been received for it.²

§ 39. Equity will restrain an innocent *bonâ fide* assignee, for value, of a security given for money lost in gaming, from enforcing his claim, even upon a judgment already obtained.³ So on a bill filed to enjoin a judgment, because the debt was for money won at cards, the evidence leaving it doubtful whether this was the consideration, or, if it was, whether the judgment creditor, an assignee of the debt, had not taken it under a false representation or concealment of the debtor as to the consideration; held, the bill should not be dismissed, but that the injunction should be continued, and an issue had to determine the facts.⁴

§ 40. But relief will not be granted against a judgment upon a note, given solely for the purpose of testing, by a collusive action, whether the maker had any title in property held in trust for his wife.⁵

§ 41. In reference to *formal errors* as a ground for equitable interference; the fact, that an error in the docketing of a

¹ Freeman v. Sedwick, 6 Gill, 28.

⁴ Nelson v. Armstrong, 5 Gratt.

² Richardson v. Williams, 3 Jones, 354.
Eq. 116.

⁵ Wells v. Smith, 13 Gray, 207.

³ Gough v. Pratt, 9 Md. 526.

judgment was the error of the clerk, and not the fault of the judgment creditor or his attorney, will not authorize the Court of Chancery to interfere, to deprive another judgment creditor of his legal priority thereby obtained.¹ Judgments of a court of record cannot be falsified by proof *aliunde*. Thus where a judgment was entered by the clerk as upon a verdict, the error cannot be corrected by a court of chancery, upon parol proof that the judgment, by agreement, should have been entered *nihil dicit* for a less sum.² But where A commenced a suit against B on a valid debt, and attached a large amount of property; the writ being issued by a clerk who had usually issued such writs, but, as was afterwards decided, without authority; and B brought an action of trespass against A and obtained judgment; and A filed a bill to enjoin the judgment: held, he was not entitled to relief.³

§ 42. A defendant in chancery, who resists the complainant's injunction, on the ground of a judgment against the complainant at law, must exhibit the record, that the court may see that the form of action prosecuted admitted the defence.⁴

§ 43. Equity will not perpetually enjoin a judgment, upon the ground that the officer's return as to the service was false.⁵ (a) So a bill for an injunction did not allege fraud on the part of the plaintiff in the judgment, but merely that the deputy sheriff served the summons out of his bailiwick, and, being informed of the defendant's residence out of his bailiwick, failed to make the return of *non est* as he had promised to do. The bill also admitted indebtedness for a part of the amount, but did not state how much, nor offer to pay it. Held, no sufficient ground of injunction.⁶ So (in California) a

¹ *Buchan v. Sumner*, 2 Barb. Ch. 165.

² *Bank of Tennessee v. Patterson*, 8 Humph. 363.

³ *Stetson v. Goldsmith*, 31 Ala. 649.

⁴ *Williams v. Caplinger*, 6 Humph. 257.

⁵ *Walker v. Robbins*, 14 How. 584.

⁶ *Gardner v. Jenkins*, 14 Md. 58.

(a) As to the evidence on which it was held that service must be considered good, and such as to preclude relief from the judgment, see *Windwart v. Allen*, 13 Md. 198.

judgment by default will not be enjoined, on the ground that the sheriff's return on the summons does not show the place in which service was made, where it is proved on the hearing, that the defendant was served in a certain county in the State more than forty days before the entry of his default.¹ But equity will enjoin the judgment in a suit where the plaintiff is a sheriff and serves his own writ.² So, where no process was executed upon a defendant in an action at law, and he did not appear or make defence, and judgment went against him, of which he had no notice until long after its rendition; held, he was entitled to an injunction against the judgment, whether he could have made a valid defence or not.³ And a judgment obtained by means of a false return, and without any notice to the defendant, may be relieved against. Thus where it was uncertain whether the notice was served at all, and, if it was, it appeared to have been served in such a manner, by reading it to the defendant, who was a laboring man and unacquainted with such matters, and at the same time handing to him the declaration in another suit, as would naturally mislead him; and it appeared that he had a good defence to the action: an injunction against the judgment was ordered.⁴

§ 44. That a debt was divided, and suit brought on each portion in a justice's court, which would have no jurisdiction over one suit for the whole amount; is no reason for enjoining the judgment in one suit, unless it also appears that by means of the division the defendant was deprived of some right or remedy, and that he had not consented to the division.⁵

§ 45. Questions often arise, in reference to *the precise mode* in which the judgment sought to be enjoined was rendered.

§ 46. Equity will relieve against a judgment obtained on *default*, by the fraud of the plaintiff.⁶ Or, where there is no

¹ Pico v. Sunol, 6 Cal. 294.

² Knott v. Jarboe, 1 Met. (Ky.) 504.

³ Bell v. Williams, 1 Head, 229.

⁴ Owens v. Ranstead, 22 Ill. 161.

⁵ Pryor v. Emerson, 22 Tex. 162.

⁶ Porter v. Moffet, 1 Morris, 108.

service and a default, if the merits require it.¹ So where, by the neglect of an attorney of good reputation, a party has been defaulted; if he, immediately upon discovering the default, apply for redress, more especially where the attorney is insolvent.² But special grounds must be shown for relief.³ Thus where a defendant, whose counsel was elected to the bench, heard the court announce at the next term, that no case in which he had been employed would be heard, and went away and was defaulted; held, in the absence of any substantial defence, he was not entitled to an injunction.⁴ So a party, against whom a judgment at law is rendered by default, cannot obtain relief against it in equity, upon the ground that his attorney failed to appear for him, and appeared for the opposite party; when he had only requested the attorney to attend to any and all business for him, and had not mentioned any particular case.⁵ Nor where a defendant misnamed in the process is in court when judgment is rendered against him by default, and fails to defend by advice of his counsel.⁶ Nor where one, not duly served with process, suffers judgment by default, and, on the execution of a writ of inquiry at a subsequent term, appears, defends, submits evidence to the jury, makes various motions, files a bill of exceptions, and appeals, but makes no proper attempt to have the judgment by default set aside. His remedy was perfect at law.⁷

§ 47. A judgment may also have been rendered by *confession*.

§ 48. In order to induce a court of equity to declare a judgment confessed for a certain amount to be merely collateral security for whatever sum might be found due, they must be satisfied beyond a reasonable doubt that such was the agreement; but they will then enjoin the judgment, on the ground that to enforce it would be a fraud.⁸ Thus a perpetual injunction will be granted against a judgment confessed by one part-

¹ Lucas v. Waller, 1 Morris, 303.

² Huebsch v. Baker, 7 Wis. 542.

³ George v. Tutt, 36 Mis. 141.

⁴ Cardin v. Jones, 23 Geo. 175.

⁵ Watts v. Gayle, 20 Ala. 817.

⁶ Graham v. Roberts, 1 Head, 56.

⁷ Ib.

⁸ Heighler v. Savage, &c., 12 Md. 383.

ner against the firm, without consent of the other.¹ So A held a note against B, and signed the following indorsement: "If B does not bring a suit against C, I am not to demand the within." B confessed judgment at law, reserving equity, and in his bill charged, that the note was given for services to be rendered in prosecuting a *caveat*, and prayed discovery. A answered that he did not remember for what suit the note was given. A perpetual injunction was decreed.² So, in August, 1844, B recovered a judgment against A, who was then seised of certain lands. On the 6th of January, 1845, A conveyed an undivided half of the lands to C. On the 14th of January, 1845, A confessed a judgment to D, upon which execution was immediately issued, and levied on all the rights of A. On the 19th of August, 1845, execution was issued on B's judgment, and levied on all the lands. An injunction was allowed, restraining the sheriff from selling, under the judgment confessed to D, the undivided half which had been conveyed to C prior to the entry of his judgment. The bill further charged, that the judgment to D was collusively confessed, and taken for the purpose of defeating the prior judgment, and of protecting A's property from his creditors; and prayed that B's judgment might be declared the prior lien on all the lands. A demurrer to the bill was overruled.³ So a *scire facias* on a dormant judgment, obtained during the sickness of the defendant and in the absence of his attorney, by an unauthorized confession of judgment by an inexperienced attorney, upon a note outlawed by the statute of limitations, which had been duly pleaded, is properly restrained by injunction, until the complainant can establish the facts alleged in his bill, in which case either the judgment should be decreed satisfied, or the suit to revive it perpetually enjoined.⁴

§ 48 a. But it will require a very strong case to justify an injunction upon a judgment rendered by confession on a debt due for more than thirty years, from which no appeal has been taken.⁵ So where judgments were rendered on confession before a justice of the peace, no warrants having been issued or

¹ Christy v. Sherman, 10 Iowa, 535.

⁴ Cheek v. Taylor, 22 Geo. 127.

² Daveiss v. M'Kee, 1 Bibb, 331.

⁵ Gravely v. Southerland, 29 Geo.

³ Oakley v. Young, 2 Halst. Ch. 453. 335.

served on the defendants ; on a bill for injunction to restrain executions, it was held, that relief should be sought at law, by appeal, and not in equity.¹

§ 49. Where contractors on a railroad agreed with the company to refer all disputes and differences to the engineer of the company, whose decision should be conclusive and without appeal ; and the engineer was a stockholder to the amount of ten thousand dollars, which was unknown to the contractors at the time of making the agreement : held, on a bill filed by the contractors, equity might set aside the award, and order an account for their damages by breach of the contract.² So where a defendant agreed that the justice should render a conditional judgment against him, and the justice entered an absolute judgment, by confession ; held, chancery had jurisdiction to relieve against the judgment.³

§ 50. Equity will not grant relief against a decree of the Probate Court, because it was rendered without notice to the parties, when the rendition of the decree was suspended by consent, until the opinion of the Supreme Court in another case between the same parties "could be had," and the decree was not rendered until after such opinion had been obtained.⁴

§ 51. Where an illegal contract has been partially performed, and the party who has received the benefit of such performance gives a judgment for the value, equity will not relieve him from the judgment, although the amount could not have been recovered at law, on account of the illegality.⁵

§ 52. An equitable jurisdiction is exercised over judgments entered by confession, upon *bonds and warrants of attorney*, by courts of law.⁶ But where a debtor who is under arrest gives to the creditor, as the consideration for his discharge, a warrant of attorney for the whole amount of the debt, together

¹ Brumbaugh v. Schnebly, 2 Md. 320.

² Milnor v. Georgia, &c., 4 Geo. 385.

³ Gwinn v. Newton, 1 Humph. 710.

⁴ Stein v. Burden, 30 Ala. 270.

⁵ Young v. Beardaley, 11 Paige, 93.

⁶ Lake v. Cooke, 15 Ill. 353.

with the sums due on other accounts ; his being under arrest will not be a ground for relief, if the arrangement has been entered into by him deliberately, advisedly, and with full knowledge of the circumstances. So, although one of the debts is barred by the statute of limitations.¹

§ 53. A bill for relief against a judgment at law, rendered by default, alleging that the writ was not served upon the complainant, that an attorney *entered his appearance* for him without his knowledge, and that judgment was rendered without the knowledge of the attorney, and showing a good defence at law, the allegations being wholly unsupported by proof, was dismissed, and the injunction dissolved.² So where a regular attorney of the court appears and answers for the defendant in a suit at law, a judgment recovered by the plaintiff will not be vacated nor execution enjoined, though the attorney appeared without authority, unless it is shown that the attorney is not of sufficient ability to answer for the damages caused by his unauthorized appearance, or there has been collusion between him and the plaintiff in the suit at law.³

§ 54. Equity will not relieve against a judgment, where the plaintiff has given a *forthcoming bond* which was forfeited, although the judgment on the bond was erroneous, the party having a remedy for the error at law.⁴

§ 55. Equity will not reëxamine and readjust settlements made by *compromise* judgments in courts of law having jurisdiction of the subject-matter, unless in case of fraud, accident, or mistake.⁵

§ 56. A bill will not lie to enjoin a judgment upon an *award*, upon the ground that the arbitrators received hearsay evidence, and committed other irregularities at the hearing.⁶ (a)

¹ Richards v. Curlewis, 31 Eng. Law & Eq. 419.

² Prather v. Prather, 11 Gill & J. 110. See Cayce v. Powell, 20 Tex. 767.

³ Bunton v. Lyford, 37 N. H. 512.

⁴ Robb v. Halsey, 11 S. & M. 140.

⁵ Hahn v. Hart, 12 B. Mon. 426.

⁶ Hunt v. Coachman, 6 Rich. Eq. 286.

(a) There is no original jurisdiction in the Court of Chancery, in the nature of

§ 57. Where the execution of a judgment has been enjoined, and the defendant admits, upon being interrogated, a *partial payment*, the injunction should be perpetuated for this amount, and dissolved for the remainder.¹ So where part of the judgment appears from the petition to be just, an injunction as to

¹ *Perry v. Kearney*, 14 La. An. 400; *Tapp v. Beverley*, 1 Leigh, 80.

a writ of prohibition, to restrain an arbitrator from making an award. "The only jurisdiction to stop the proceedings before arbitration is founded upon the conduct of the parties. If, for example, defendants are seeking to enforce certain rights which they conceive they are entitled to exercise under a deed for submission to a reference, and the court should be of opinion that they have debarred themselves from exercising those rights by the course of conduct which they have adopted, there arises an equity, which prevents them from prosecuting proceedings, however they might otherwise be entitled to do so under the particular jurisdiction which is beyond the control of this court." These remarks were made in a case, where a railroad contractor and the railroad had agreed to refer any questions which might arise between them, reserving the right to the corporation of taking possession of the road upon certain contingencies; and it was claimed that by thus taking possession the jurisdiction of the arbitrator was ousted. The vice-chancellor's order, restraining the reference till the hearing or further order, was discharged on appeal, "the reference to go on, the defendants undertaking not to take any proceedings upon any award without the leave of the court." *Pickering v. Cape Town, &c.*, Law Rep. (Eng.) Eq., January, 1866, pp. 84-7-8. In a case of arbitration by rule of court, the defendant obtains an injunction against proceeding with the arbitration. The plaintiff answers, and appeals from the injunction, giving bond. Pending the appeal the arbitrator files his award. Held, the bond suspends the injunction till judgment on appeal, and the arbitrator might go on with the case. *Northern, &c. v. Canton, &c.*, 24 Md. 506; Code, art. 5, § 23. The defendant recovered judgment against the plaintiff, being at the same time surety for A upon a bond, for submitting to arbitration differences between the plaintiff and A. The plaintiff obtained an award against A, and then filed a bill, to have the amount of the judgment credited on the award. Held, as the defendant's liability to A was contingent, he should not be enjoined from collecting his judgment, unless alleged to be insolvent or about to leave the State. *Hinrichsen v. Reinback*, 27 Ill. 295.

In a case relating to the purchase of shares in a copper company, where the controversy arose out of a mistake in the office copy of an answer, substituting "*per shares*" for "*ten shares*;" the master of the rolls remarked: "I do agree the court ought to be very tender how they help any defendant after a trial at law in a matter where such defendant had an opportunity to defend himself. But still such cases there are, in which equity will relieve after a verdict, in a matter where the defendant at law might properly have defended himself; as if the plaintiff at law recovers a debt against the defendant, and the defendant afterwards finds a receipt under the plaintiff's own hand. Here the plaintiff recovered a verdict against conscience, and though the receipt were in the defendant's own custody, yet he not being then apprised of it, seems entitled to the aid of equity. So if the plaintiff's own book appeared to be crossed, and the money paid before the action brought." *Gainsborough v. Gifford*, 2 P. Wms. 425.

the whole should be reversed.¹ (a) So where, in reducing to writing a contract for the sale of land and the crops thereon, valued at \$100 in the contract, the undertaking of the seller to put the purchaser in possession of the crops was omitted by mistake, and he did not thus put him in possession, but recovered judgment for the whole amount of the purchase-money; held, the judgment should be enjoined for \$100.² So where foreigners were sued, in an action which gave them no notice of the particular claim, and new counts were filed at the trial, covering a claim not before embraced in the declaration, and a verdict was given for the plaintiff, which could not have been obtained upon facts, which the defendants would have supplied on having notice; held, a case of surprise, and that an injunction should issue as to so much of the verdict as was clearly wrong, and which would not have been given but for the surprise.³ So where the parties to a suit submit to arbitration, and an award is made that the defendant pay a certain sum, with costs, which he does, for the debt, by note with security, but fails to pay the costs, and the plaintiff recovers judgment for the whole debt, the defendant not appearing and pleading; equity will relieve on the ground of surprise.⁴ So A, having a judgment against B, agreed to receive from the trustee of B the amount of the judgment, without interest, in satisfaction, and a part was accordingly paid. A afterward took out execution for the whole amount. Held, on a bill by the trustee, that he might have the interest enjoined, or his obligation to pay the judgment cancelled.⁵ So in an action at law on accounts, the defendants applied for an injunction to the judgment. Held, that a mistake and miscalculation on the part of the jury, which, if discovered in time, would have furnished good grounds for a new trial, entitled the appellant to relief in equity, when ascertained by after-discovered testi-

¹ *Crisswell v. Bledsoe*, 22 Tex. 656.

² *Booth v. Kealer*, 6 Gratt. 350.

³ *Bell v. Cunningham*, 1 Sumn. 89.

⁴ *Sneed v. Town*, 4 Eng. 535.

⁵ *Thomas v. Brashear*, 4 Monr. 65.

(a) An injunction was granted of a judgment recovered for an excessive amount, after an executed agreement of settlement, set up by the defendant in the action, but made on Sunday and therefore invalid. *Blakesley v. Johnson*, 13 Wis. 530. In replevin, the judgment was for a return, or \$160 damages, the value of the property. The party may tender the property in reasonable time, and enjoin an execution for the money. *M'Clellan v. Marshall*, 19 Iowa, 561.

mony.¹ Held, also, that the relief should be by reference to a commissioner to ascertain the real amount due.² So where a judgment debtor delivered to the creditor a bill of exchange, to be credited on the judgment when collected; on a bill to enjoin the judgment, held, the creditor must credit the bill upon the judgment, or deliver it back to the debtor.³ So where a justice's judgment was enjoined upon proof that it was had without service; upon admission of the debt, the court, having acquired jurisdiction, continued the injunction as to the justice's costs, but gave judgment to the respondent for the debt.⁴ But an injunction was refused where there should have been credits, and counsel were instructed that they should be allowed in the judgment or upon the execution sale.⁵ So where one ground of injunction against a judgment was that the plaintiff in the suit enjoined had received payment of a large part of the debt, in consideration of which he had agreed to dismiss the suit at his own cost, and that he had not done so, but had taken judgment for the whole amount; held, it did not appear that he was seeking to enforce payment without giving the proper credits, and, if he was, the complainant could not enjoin the whole judgment because of the payment of a part.⁶

§ 58. When the amount of the *fi. fa.* exceeds that of the judgment, the right to enjoin is limited to the excess.⁷

§ 59. Equity will grant relief against a judgment obtained by fraud, to the extent of the injury, and, if it applies only to part of the land, relief will be granted to that extent.⁸

§ 60. Where, on relieving against a judgment, there is no means of ascertaining how far it is correct, but only that it is unconscionable to some extent, it will be set aside *in toto*.⁹

¹ *Rust v. Ware*, 6 Gratt. 50.

² *Ib.*

³ *Newman v. Meek*, 1 S. & M. Ch. 207.

331.

⁴ *Willis v. Gordon*, 22 Tex. 241.

⁵ *Shricker v. Field*, 9 Iowa, 366.

⁶ *Alexander v. Baylor*, 20 Tex. 560.

⁷ *Barrow v. Robichaux*, 14 La. An.

⁸ *Dunlap v. Stetson*, 4 Mas. 349.

⁹ *McRae v. Woods*, 2 Wash. Va. 80

§ 60 a. A judgment at law against two may be annulled by decree of a court of chancery as to one, and remain binding as to the other.¹

§ 61. Equity has, under ordinary circumstances, no power to reduce an assessment of damages by a jury in an action of covenant, or to enjoin the collection of any part thereof.²

§ 62. A bill, to enjoin a judgment on account of usury, must tender the amount equitably due.³ And an injunction, on the ground that the defendant is entitled to a credit for part of the judgment, should be with a proviso, that the plaintiff may proceed by execution to collect the balance.⁴

§ 63. *Payment* may be set up as the ground for an injunction. As where a payment is made in confidence that it will be credited, and the credit is not given, but judgment taken for the whole amount.⁵ So, where prior judgments have been paid, and yet the holder threatens to levy on land, the holder of a junior judgment may have this cloud on the title removed by injunction.⁶ Judge Story says: "One of the plainest cases, which can be put, of the propriety of granting an injunction to a judgment at law, is, where it has been in fact satisfied, and yet the judgment creditor attempts to set it up, and enforce it, either against the judgment debtor or against some person claiming under him who is thereby injured in property or rights. In such cases a court of law would often be exceedingly embarrassed in giving the proper redress if it could give it at all. But courts of equity deal with it at once, and apply the most complete remedial relief.⁷ Suppose a party is sued at law for a debt of long standing; and a judgment is obtained against him for the amount, although he has actually paid it, but he is unable, after due search, to find a receipt or release which would establish the fact; and then, after judgment, the paper is unexpectedly found, either in his

¹ Kennedy v. Evans, 31 Ill. 258.

² Reed v. Clarke, 4 Monr. 18.

³ Shelton v. Gill, 11 Ohio, 417.

⁴ Hodges v. Planters', &c., 7 Gill & J. 306.

⁵ Dickenson v. M'Dermott, 13 Tex. 248.

⁶ Shaw v. Dwight, 16 Barb. 536.

⁷ 2 Story's Eq. 194, sect. 876.

own possession or in that of a third person. At law there would be no redress under such circumstances. The judgment would be conclusive. But a court of equity would in such a case afford relief by a perpetual injunction of the judgment."¹ Thus, after a mandate from the Supreme Court of the United States, ordering the Circuit Court to enter judgment for the plaintiff, the defendant moved the Circuit Court for leave to file a plea *puis darrein continuance* that he had paid the whole amount in question under process from the State courts; but the court refused, on the ground that they could do nothing but carry out the mandate of the Supreme Court. Held, such defendant was entitled to an injunction to stay proceedings at law under the judgment of the Circuit Court.² So (in Maryland) when a decree of the Court of Appeals has been satisfied, either by a payment in money, or money's equivalent, but the party is proceeding to enforce it by execution; equity may and is bound to prevent it by injunction.³

§ 64. But it is no ground for relief from a judgment, that a payment on a bond was not indorsed on the bond. Such defence might have been made at law.⁴ Nor that the party did not prove, on the trial, payments which he alleges he had made, unless he shows some fraud or circumvention, to prevent his making the proof.⁵ So, it is held, the defendant in a judgment has a full and complete remedy at law, by *superseas*, to obtain credit for a part payment of the judgment, and consequently such payment constitutes no ground for equitable relief.⁶ So equity will not interfere with a judgment, recovered after a settlement between the parties, prior to the commencement of suit. The remedy is by appeal or error.⁷ So, in Texas, the statute (Hart. Digest, Art. 1599) manifestly has no application to an injunction to stay execution, for causes which have arisen subsequent to rendition of the judgment. As that the debtor had placed claims in the

¹ 2 Story's Eq. 196, sect. 879.

² *Humphreys v. Leggett*, 9 How. 511.
297.

³ *M'Clellan v. Crook*, 4 Md. Ch. Decis. 398.

⁴ *Harnsbarger v. Kinney*, 13 Gratt.

⁵ *Deaver v. Erwin*, 7 Ired. Eq. 250.

⁶ *Perrine v. Carlisle*, 19 Ala. 686.

⁷ *Dunn v. Fish*, 8 Black. 407.

hands of the creditor's attorney, to be collected and applied on the execution, and that large sums had been collected on these claims. These facts do not show payment.¹

§ 65. Where the defendant in a judgment pays the amount to the plaintiff, after notice of an assignment of the judgment, equity will not relieve him from an execution thereon for the benefit of the assignee.² But where an agent prosecuted a suit in favor of his principal to judgment, and indorsed upon the execution that a part of it was for his own benefit; and, before the execution was placed in the hands of the sheriff, the defendant paid the whole amount to the principal, and took his receipt in full discharge: held, equity would enjoin all further proceedings on the execution.³

§ 66. On a bill, filed by sureties in a bond given for the purchase-money of land, to have a judgment thereon against them entered satisfied, or perpetually enjoined; in granting the prayer of the bill, the court must vacate the sale of the land; and, to do this, the purchaser or his heirs must be parties to the bill.⁴

§ 66 a. Where the plaintiff has enjoined the execution of a judgment, alleging that it had been paid, and praying that it should be decreed to have been satisfied; it is error to render a final judgment, on overruling the defendant's motion to dissolve the injunction. The conservatory process of injunction, in such a case, is separate from the principal demand, which should be put at issue regularly, before final judgment.⁵

§ 67. Where the petitioner avers that an execution had been issued "for the amount of the judgment and costs," and that certain payments had been made thereon, but not, distinctly, that they had not been credited, a general demurrer cannot be sustained.⁶

¹ Williams v. Bradbury, 9 Tex. 487.

² Holland v. Dale, Minor, 265.

³ Crawford v. Thurmond, 3 Leigh, 85.

⁴ Buchanan v. Torrance, 11 Gill & J. 342.

⁵ Knox v. Coroner, 13 La. An. 88.

⁶ Williams v. Bradbury, 9 Tex. 487.

§ 68. Where creditors, after the debt has been paid to them, seek to enforce a judgment against a receiptor of the property attached, equity, to prevent circuitry of action, will enjoin the suit. The judgment against the receiptor, being merely collateral to the debt, is in the nature of a penalty; and if payments were made prior to that judgment, and not allowed for in making it up, equity will restrict the creditor to the collection of the balance. Where it is obvious that the creditors, after having obtained judgment against the receiptor for the full amount of the debt, making no allowance for payments, received from the receiptor the balance actually due to them upon the debt, and, by words and actions, gave him to understand that they considered the judgment against him paid, with a mere view of keeping him along until his remedy by petition for a new trial should be gone by lapse of time, and then pursuing him for the balance appearing due upon the judgment against him; there can be little doubt that equity may enjoin the judgment, upon the mere ground of fraud.¹

§ 69. Equity will relieve against the suing out or levy of execution upon a judgment enjoined, which has been discharged by proceedings in bankruptcy.² (See *Bankruptcy*.) But where a defendant filed a bill in equity to set aside a judgment, alleging that the plaintiff, after a default at the first term, fraudulently permitted the case to be continued to the second, third, and fourth terms, and at the fifth term took his judgment, the defendant having filed no plea or answer, notwithstanding he had obtained a discharge in bankruptcy, subsequent to the first term, supposing judgment had been rendered at that term; held, on demurrer to the bill, that the demurrer only admitted the facts alleged, and not the fraud; and that those facts did not constitute a fraud in the procurement of the judgment, so as to authorize a court of equity to set it aside.³

§ 69 a. Analogous to payment, as a defence, is that of *set-off*.

¹ *Paddock v. Palmer*, 19 Vt. 581.

² *Bellamy v. Woodson*, 4 Geo. 175.

³ *Peatross v. McLaughlin*, 6 Gratt.

§ 70. The allegations in a bill in equity, for an injunction against a judgment, that the defendant is indebted to the complainant, that he is insolvent, and that the demand sought to be enforced at law is satisfied, are sufficient to give the court jurisdiction.¹ So an assignee of a dormant judgment, against one who is insolvent, may bring a suit to have it revived, and set off against a judgment which has since been recovered against him, by the defendant in the dormant judgment, which the latter is about to enforce; and in the mean time execution on the latter judgment will be enjoined.² So A obtained two judgments against the administrators of B, which were unsatisfied. Commissioners were appointed to sell the real estate of B, on credit, and to pay over the proceeds to the administrators. A purchased at the sale, giving his notes in payment. Held, that A might enjoin a judgment on the notes, and set off the judgments held by him against it, if it did not appear by the answer that there were any demands against the estate entitled to precedence; and that it was not necessary for A to aver that fact in his bill.³

§ 71. Where G., and L. his wife, who was executrix of a will by which she was required to educate and support the wife of M. during her minority, boarded M.'s wife under an agreement not to charge her for such board, and afterwards obtained judgment in attachment for such board, and at the time of the attachment had funds in their hands belonging to M. in the right of his wife, more than enough to satisfy the judgment: it was held that M. was entitled to be relieved against the judgment; and that, independent of the agreement, if G. and his wife had funds enough in their hands to pay the board of M.'s wife, which could properly be applied to such payment, the court would compel such an appropriation in satisfaction of the judgment.⁴

§ 72. But a party going into equity, to enjoin a judgment on the ground of offsets, must show as strong a claim to be paid the offsets as if he were suing on them in law or equity.⁵

¹ *Bettison v. Jennings*, 3 Eng. 287.

² *Simpson v. Huston*, 14 Tex. 476.

³ *Dickinson v. Chism*, 2 Monr. 144.

⁴ *Moore v. Gamble*, 1 Stockt. 246.

⁵ *Walker v. Ayres*, 1 Clarke, 449.

And a defendant in an action at law, having a set-off available either at law or in equity, but neglecting to plead it, cannot afterwards make it a ground of relief in equity from the judgment against him in such action, without showing sufficient excuse for his neglect. That he was advised the law court had no jurisdiction of the set-off, is no such excuse.¹ So a claim which could have been set off in the probate court before the decree there, but which, by advice of counsel, was not there presented, is no ground for relief in equity against that decree.² So where an answer admitted, that the jury did not allow a credit to which the complainant was entitled, but it appeared upon calculation, upon the data on which the verdict was made, that the credit was allowed; a decree enjoining the amount was reversed.³ So an injunction was refused, where a party was guilty of negligence in omitting to file a set-off, though he alleged sickness in his family and the absence of his counsel; there having been no motion for a continuance, nor affidavit of grounds therefor.⁴ And where, at law, the defendant was prevented by unavoidable accident from setting up independent offsets liable to be enforced at law; it is held that he cannot enjoin the judgment and set up his offsets against it, but must pursue his remedy at law. And if his offsets are only recoverable in equity, he cannot enjoin the judgment and avail himself of his claims against it.⁵ So where a bill was filed to have an execution enjoined, on the ground that the plaintiff in execution was insolvent, and, at the time he recovered his judgment, was indebted to the defendant in execution, and the complainant sought to have this indebtedness set off against the execution; held, the bill must be dismissed for want of equity.⁶ So A obtained a judgment against B for \$1,200, and subsequently B purchased and took a written assignment of two judgments against A for \$1,384, and filed his bill to have them set off as a satisfaction of A's judgment. Held, according to the Georgia judiciary act of 1799, it should affirmatively appear that there were no other judgment liens upon the defendant's property, before equity

¹ *Pearce v. Winter, &c.*, 32 Ala. 68.

² *Duckworth v. Duckworth*, 35 Ala. 70.

³ *Pogue v. Shotwell*, 2 Dana, 281.

⁴ *Griffith v. Thompson*, 4 Gratt. 147.

⁵ *Hudson v. Kline*, 9 Gratt. 379.

⁶ *Rives v. Rives*, 7 Rich. Eq. 353.

would interfere and decree satisfaction of a particular judgment therefrom ; and that the complainant had an ample and adequate remedy at law, to obtain satisfaction of his judgments out of the property of the defendant.¹ So A recovered a judgment against B, in a justice's court, on a store account for \$75. B, alleging that A was indebted to him in the sum of \$180 on a promissory note, which he could not have pleaded in offset, in a justice's court, applied for an injunction to restrain him from levying his execution until he could recover a judgment on the note, when it could be set off. Held, the petition did not state sufficient cause for an injunction, but insolvency or special circumstances of hardship should appear. Also, that the petitioner should have brought suit on the note, and in his petition have prayed an injunction. One suit then would have sufficed.²

§ 73. So equity cannot restrain the execution of a judgment recovered by a non-resident plaintiff, merely because the defendant has a cross action at law growing out of the same transaction, but which he cannot prosecute in the courts of the State as long as the plaintiff remains out of it.³

§ 74. Where a judgment at law is enjoined, and an account directed to be taken, the commissioner ought not to give the plaintiff at law credit for claims not exhibited to the jury, nor mentioned in the answer, and which are prior in date to the commencement of the suit at law.⁴

§ 74 a. But all the reasons, for interference by injunction with a judgment at law, are to be considered as modified and controlled, by the general consideration already adverted to in other connections ; that a trial at law and a judgment founded thereon cannot be revised by a court of equity, unless there are special equitable reasons for such interference. The general rule is applied, of *res judicata* and *estoppel*. (a) It is said,

¹ Wellborn v. Bonner, 9 Geo. 82.

Brady v. Hancock, 17 Tex. 361.

³ Beall v. Brown, 7 Md. 393.

⁴ Lipscomb v. Winston, 1 Hen. & M. 453.

(a) This point is illustrated by a late case in Pennsylvania reported in the Legal Intelligencer. District Court. City v. Fricke. Opinion by Thayer, J.

“There are cases cognizable at law, and also in equity, and of which cognizance cannot be effectually taken at law, and

The plaintiff brought a *scire facias* on a municipal claim for curbing and paving Sharpnack Street, in the twenty-second ward of the city of Philadelphia, to which the defendant pleaded that before the alleged curbing and paving had been done, he filed his bill of complaint in the Court of Common Pleas of the city and county of Philadelphia, in equity, against the plaintiff and others, averring that the said Sharpnack Street had always been and remained his private property, that he had never dedicated it to the public, that no damages had ever been assessed, and that it had never been opened by authority of law, and praying that the defendants might be perpetually restrained by the order and injunction of said court from curbing and paving the said street. Whereupon the said court did, on the 25th day of July, 1859, after full and due consideration, and after due notice to the said defendants, enjoin them from curbing and paving said street. The plea further avers that afterwards the cause was so proceeded in in the said Court of Common Pleas, that the said court did, on the 19th day of November, 1859, duly order and decree that the said city, their officers, agents, and attorneys be and are hereby enjoined from filing any liens against the said complainant, who is the defendant in this suit, in any court whatever for the work, labor, and materials referred to in the complainant's bill, and from all attempts to collect the amount thereof from said complainant; and that the said orders and decrees are now in full force and not in the least reversed, satisfied, discharged, or made void as by the record remaining in said Court of Common Pleas fully appears.

To this plea the plaintiff has demurred.

The law laid down by Lord Chief Justice De Grey, in the *Duchess of Kingston's* case (20 Howell's St. Tr. 538), in reference to the conclusiveness of judgments recovered, with the distinctions which he draws, has been very often recognized and acted upon in Pennsylvania. *Hibshman v. Dulleban*, 4 Watts, 183; *Lentz v. Wallace*, 5 H. 412; *Lamb v. Miller*, 6 H. 448; *Martin v. Gernandt*, 7 H. 124. The principle has never been stated in a clearer or more condensed form than that in which it is put by the lord chief justice in the leading case. “From the variety of cases in respect to judgments being given in evidence,” said he, “these two distinctions seem to follow as being generally true: first, that the judgment of a court of concurrent jurisdiction directly upon the point, is, as a plea, a bar, or as evidence conclusive between the same parties on the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.”

Decrees in chancery stand upon the same footing in this respect as judgments at common law. *Seitzinger v. Ridgway*, 9 Watts, 496; *Kelsy v. Murphy*, 2 Casey, 78; *Evans v. Tatem*, 9 S. & R. 252; *Sibbald's case*, 12 Peters, 492; *Sparks v. Walton*, 4 Phila. R. 93.

But it is objected by the plaintiff in his assignment of cause for his demurrer in the present case, that the plea does not allege a final decree. In this we do not agree with him. The plea alleges that the cause was so proceeded in that the Court of Common Pleas did, on the 19th of November, 1859, order and decree that the said city, their officers, agents, and attorneys be, and are hereby

therefore equity does sometimes interfere ; so, where a verdict has been obtained by fraud, or where a party has possessed himself, improperly, of something, by means of which he has an unconscientious advantage at law, which equity will either put out of the way or restrain him from using : but without circumstances of that kind, I do not know that equity ever does interfere to grant a trial of a matter which has already been discussed in a court of law, a matter capable of being discussed there, and one of which the court of law had full jurisdiction.”¹

§ 75. And, in conformity with these views, an injunction will not be maintained in arrest of an execution, on grounds that might have been pleaded in defence before judgment ;² or been made the ground of motion.³ Where a defence has been made to a suit at law, the defendant has elected his tribunal ; and, from that time, he must make his entire defence in that court, if such as may be heard by it.⁴ Thus, in case of a bill for an injunction against a judgment and a new trial, alleging the same facts pleaded in answer to the suit at law ; held, the judgment was conclusive, and the bill was dismissed.⁵ So when a cause, exclusively of legal jurisdiction, has been tried at law, and a judgment rendered against the defendant, and there was no fraud or concealment by the plaintiff at law, chancery has no jurisdiction to interfere.⁶ So, as we have already seen in another connection, the execution of a judg-

¹ Per Lord Redesdale, *Bateman v. Willoe*, 1 Sch. & Lef. 201 ; *Clute v. Potter*, 37 Barb. 199.

⁴ *Dickson v. Richardson*, 16 Ark. 114.

² *McRae v. Purvis*, 12 La. An. 85.

⁵ *Forsythe v. McCreight*, 10 Rich. Eq. 308 ; *Yongue v. Billups*, 23 Miss.

³ *Van Vleck v. Clark*, 38 Barb. 316 ;

407.

McCollum v. Prewitt, Ala. Sel. Cas. 498.

⁶ *White v. Cahal*, 2 Swan, 550.

enjoined from filing any liens against the said complainant in any court whatever, for the work, labor, and materials referred to, and from any attempt to collect the amount thereof. The decree being pleaded — not as a decree until the further order of the court — but as a decree without limitation as to time or other qualification, it is to be taken as a final decree, and is a complete estoppel of the plaintiffs in this suit. Even if this were otherwise, our regard for that comity which should exist between tribunals of concurrent jurisdiction would compel us to pause before proceeding with a cause commenced in defiance of the decree of a court of competent jurisdiction, which had previously taken cognizance of the matter in dispute, and in which the cause is still depending. Judgment for the defendant.

ment cannot be enjoined on grounds which *might have been* urged as a defence to the original action.¹ So where a party first submits to try at law, with a knowledge of the facts upon which he rests in support of his title, and a verdict is rendered against him ; he cannot come into equity and file his bill for discovery and relief, and enjoin the operation of the verdict, until he can have another trial in equity in attempting to perfect his title.²

§ 76. Of four obligors, joint and several, A and B were sued separately at law. They defended the actions on the ground of fraud and misrepresentation, but judgments were recovered against them. The four then paid up the amount ; and C and D assigned their interest to A and B, who then filed their bill against the obligee, seeking relief on the same ground on which the actions at law had been defended, and at the trial used C as a witness. Held, they were not entitled to relief.³ So equity will not restrain the execution of a judgment upon a contract, the consideration of which was illegal, when the plaintiff knew of the illegality, and might have set it up in defence ; and, after the recovery, executed a bond for the payment of the judgment, which operated as a second judgment against him.⁴ So where a defendant sets up a former recovery in defence, and succeeds, he is estopped afterwards, in an action against him upon the former judgment, to deny its validity ; and, on a bill by him to enjoin the judgment rendered upon the former judgment, he cannot deny the validity of the judgments in his favor. And it makes no difference, that the plaintiffs replied *nul tiel record*, as the reply was appropriate, and necessary to elicit the opinion of the court on the effect of the record. Nor that the former recovery was had in a different State from that in which the subsequent suit is brought.⁵

§ 77. *Mutual accounts*, if not complicated, do not furnish ground for overhauling a judgment at law, more especially when they have been submitted to, and passed upon by the

¹ *Minor v. Stone*, 1 La. An. 283.

² *Donaldson v. Kendall*, 2 Geo. Decis. 227.

³ *Campbell v. Briggs*, 4 Rich. Eq. 370.

⁴ *Sample v. Barnes*, 14 How. 70.

⁵ *Lucas v. Bank, &c.*, 2 Stew. 280.

court.¹ So a defendant, who has demurred to the declaration, will be regarded as having elected to defend at law, and will be precluded from coming into equity for relief, in reference to any matter of defence of which he might have availed himself in a court of law.² So, if a defendant at law makes an equitable defence, if it be such as courts of law take cognizance of, he cannot come into chancery for relief, unless unavoidable accident, ignorance of facts, surprise, or fraud, have prevented him from making his defence at law.³ And a defence cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of the court that the defence ought to have been sustained at law. Thus the allegation, that the judgment was obtained by fraud, was denied by the answer, and not established by proof. The bill contained no allegation that the complainant was defeated at law by accident or surprise, nor that the proof he offered, upon the question there decided, came to his knowledge after the trial. Held, a court of law would have refused a new trial, and there was certainly no ground for claiming the interposition of a court of equity.⁴

§ 78. But a matter which could not have been determined at law, in which the interposition of equity is asked, is not within the estoppel of the legal decision.⁵ So in case of surprise, mistake of the court, and manifest injustice, the judgment may be set aside in equity, if the adjournment of the court precludes a remedy by motion.⁶ And the rule, that such matters of defence as might have been pleaded on the merits cannot form legal grounds for an injunction, in arrest of the execution of the judgment, finds an exception in cases of persons incapacitated from contracting generally or specially. As long as the disability lasts, a judgment obtained against them, under such circumstances, and which has not acquired the force of the thing adjudged, is liable to the same objection as the obnoxious obligation.⁷

¹ *Powell v. Stewart*, 17 Ala. 719.

² *Arrington v. Washington*, 14 Ark. 218.

³ *Burton v. Hynson*, 14 Ark. 32; 7 Gill, 189.

⁴ *Briesch v. McCauley*, 7 Gill, 189.

⁵ *White v. Crew*, 16 Geo. 416.

⁶ *Bihend v. Kreutz*, 20 Cal. 109.

⁷ *Médart v. Fasnatch*, 15 La. An. 621.

§ 79. After judgment at law upon a security given for a gaming debt, the defendant may have relief in equity, although he did not resist the suit at law on that ground.¹

§ 80. On the other hand the estoppel, growing out of concealment or implied fraud, may invalidate the judgment against which relief is sought. Thus the complainant in his bill stated, that in January, 1842, A and B in consideration of \$10,000 conveyed to him a farm; that at the delivery of the deed he was ignorant that C, the defendant, had a judgment in his favor against A and B, or that he had a judgment bond against them; that the object of A and B in selling the farm was to raise money to pay their creditors, of whom C was one, and that the money was thus duly applied; that, during the negotiation, C was acquainted with the whole matter, advised the sale, and knew that the plaintiff was buying, supposing there was no judgment in C's favor; but that C, after the agreement, and on the 19th of January, 1842, had a judgment entered upon a judgment bond against A and B; that A and B had ample real estate remaining after sale to satisfy the judgment, but that C released the same or large portions thereof from the lien of the judgment; that C before the sale held two judgments against A and B, which had been assigned to him, and that, on the 7th of December, 1842, they transferred to him a draft for \$6,000, drawn and accepted as collateral security for the payment of such judgments, amounting to about \$5,000, C agreeing under his hand and seal to apply what he should receive on the second draft, first to his two last-mentioned judgments, and to account for the surplus; that C received on the draft \$5,287.52, and did not so apply the same, but raised the amount of the judgment by sales on execution, and now insists on appropriating the money to the judgment entered since the deed to the complainant, and which C holds against A and B, leaving older judgments unpaid, and thereby charging the complainant's farm with the amount thereof; and that C has caused an execution, issued on his said judgment of January 19, 1842, to be levied on the complainant's farm. The bill prayed relief, and an injunction re-

¹ Gough v. Pratt, 9 Md. 526.

straining sale on the last-mentioned execution ; and the injunction was allowed.¹ So A, while a *feme sole*, became the owner of a bond and warrant of attorney, upon which judgment had been entered up, which the plaintiff, B, had given to secure £1,200, and she repeatedly promised not to enforce them, upon which promise B contracted irrevocable engagements. A, after her marriage, jointly with her husband, took proceedings at law to enforce these securities. Upon a bill filed by him, the court granted a perpetual injunction, and directed satisfaction to be entered upon the judgment, with costs.²

§ 81. With reference to the *pleadings* in cases of this nature ; chancery will not restrain a judgment upon a bill in which all the material facts are charged upon information and belief only, without any allegation as to whence the information was derived, or any affidavit connected with the bill.³ Nor will equity enjoin a judgment at law and grant a new trial, unless the complainant's bill sets forth distinctly his causes of grievance.⁴ The plaintiff must state the cause of his not defending at law, where he had a legal defence,⁵ more especially in a case which is, in general, exclusively cognizable at law.⁶ And a court of chancery will not grant relief so readily against a judgment in attachment to an *absconding*, as to an *absent* or *non-resident* debtor ; a bill should therefore state in which of these characters the attachment was taken out against the defendant.⁷ So in a bill for relief against a judgment, on the ground that the defendant was prevented from defending at law by fraud or accident, the matter of fraud or accident must be set forth with certainty and precision, and it must also be alleged, that the fraud or accident is unmixed with any negligence on the part of the complainant.⁸ And all allegations, that a judgment was obtained *through fraud and other ill practices*, are too general to authorize the arrest of its execution.⁹

¹ Van Mater v. Holmes, 2 Halst. Ch. 575.

² Money v. Jordan, 11 Eng. Law & Eq. 182.

³ Williams v. Lockwood, 1 Clark, 172.

⁴ Gamble v. Campbell, 6 Florida, 347.

⁵ Yancy v. Fenwick, 4 Hen. & M. 423.

⁶ Dilly v. Barnard, 8 Gill & J. 170.

⁷ Moore v. Gamble, 1 Stockt. 246.

⁸ French v. Garner, 7 Port. 549.

⁹ Brooks v. Williams, 13 La. An.

§ 82. An injunction cannot stand based on a written agreement alleged to be lost, where the bill does not allege that the party in whose custody it was placed has been asked to produce it, nor that its contents can be proved, and where it appears that the party who executed it is dead, and its existence and all transactions concerning it are fully denied by the answer.¹

§ 82 a. A complaint for injunction of a justice's judgment rendered against a resident of another township, should show that it was rendered without the party's consent, and also contain a transcript or a full statement of the proceedings.²

§ 83. A bill to enjoin a judgment, on account of irregularities which can be reached by motion or appeal, must allege that the plaintiff has paid the claim for which the judgment was rendered, or has some other valid defence.³

§ 84. If a bill of injunction, to stay proceedings on a judgment, charge the plaintiff at law with having failed to do an act on which the equity of his claim depends, and in his answer he take no notice of that allegation; the court, on the hearing, will consider this an admission that he has not done the act in question, and will decree against him without any exception to the answer, or any interlocutory order, taking the bill for confessed in part.⁴

§ 85. Where a bill for relief from a judgment at law alleged, as a reason for not making a defence, that the plaintiff was deceived by his attorney as to the time of trial; held, this fact must be proved, although not answered, or denied by the answer.⁵

§ 86. All the *parties* to a decree, the execution of which is sought to be enjoined, must be made parties to the injunction bill.⁶ The plaintiff in the judgment enjoined is a necessary

¹ Kent v. De Baun, 1 Beasl. 220.

² Gage v. Clark, 22 Ind. 163.

³ Logan v. Hillegass, 16 Cal. 200.

⁴ Page v. Winston, 2 Munf. 298.

⁵ Cowan v. Price, 1 Bibb, 173.

⁶ Hendrick v. Robinson, 7 Dana, 165.

party.¹ (a) So, to a bill by a purchaser of land from a judgment debtor, to enjoin the judgment creditor from subjecting the land to his judgment, the debtor is a necessary party.² So, to a bill for relief, from a judgment on a note against the maker, in favor of an assignee of the note, the payee is a necessary party.³ So the assignee of a judgment is a necessary party to a bill, to perpetually stay proceedings thereon for equities existing between the parties previous to the assignment.⁴ But a surety need not be made party to a bill by the principal, for an injunction against a judgment.⁵ Nor a sheriff, to a bill brought to enjoin the execution of legal process.⁶ The clerk and sheriff are not proper parties to a bill for an injunction to stay execution.⁷

§ 87. The distinction is made, that no person can enjoin a judgment at law, to which he is not a party; but, if he is aggrieved by the proceedings thereon, he should pray for an injunction to the execution.⁸ Thus A bought railroad ties of B, and sold them to C, who mixed them with other ties used on the track. B gave notice to C that the ties were his, and then C refused to pay A for them. A brought a suit against C, and recovered judgment for the value of the ties. B then brought a suit in chancery, and alleged fraud in A, and the court enjoined C from paying the judgment in favor of A, and ordered the sheriff to collect it for the benefit of B. Held, that it is not a proper exercise of chancery powers, to interfere with the collection of a judgment, fairly obtained as between the parties to it.⁹ (b)

¹ *Daniel v. Hannegan*, 5 J. J. Marsh. 48.

² *Scott v. Bennett*, 1 Gilm. 646.

³ *Elston v. Blanchard*, 2 Scam. 420.

⁴ *Mumford v. Sprague*, 11 Paige, 438.

⁵ *Bentley v. Gregory*, 7 Monr. 368.

⁶ *Olin v. Hungerford*, 10 Ohio, 268.

⁷ *Edney v. King*, 4 Ired. Eq. 465.

⁸ *Jordan v. Williams*, 3 Rand. 501.

⁹ *Scott v. Whitlow*, 20 Ill. 310.

(a) A offers for probate a paper as the will of B, in which he is made executor and a legatee. Verdict against the will. A bill in equity is filed by C, to set aside this verdict, and to be allowed to prove, as the will of B, all that part of the paper in which A has no interest, alleging that the verdict was fraudulent and void. A was not made a party. Held, there was no equity in the bill. *Barksdale v. Brown*, 16 Geo. 95.

(b) A late English case suggests an exception to this general rule. The *Companies Act* of 1862 declares, that, in case of a resolution to wind up a company

§ 88. It is held that, where property of one is levied on to satisfy the debt of another, a bill of injunction may be maintained by him to restrain the sale, notwithstanding he has also remedies at law, and although the sheriff, by reason of his doubts as to the title to the property, takes an indemnifying bond.¹ But it is also held, that a sale of personal property will not be enjoined at the suit of a third person, claiming the property, but he will be left to his legal remedy.² Thus where slaves were levied on, and were claimed by a third person, under a prior sale from the debtor, equity would not restrain the sale, unless the slaves seem to possess some peculiar value, which cannot be recompensed in damages.³ So (in Louisiana) the vendor cannot enjoin the seizure and sale of the property of his vendee, when it is seized under execution as the property of a third person, on the ground that his obligation in warranty may attach. In such a suit the question of title to property is involved, and it therefore partakes of the nature of a petitory action, which can only be maintained by the party in whom the legal title is vested.⁴

§ 89. An execution in ejectment will not be restrained at the instance of a stranger holding a paramount title; for, if his title is good, the judgment does not affect him. It makes no difference, that after judgment the defendant attorned to that title and received possession under it.⁵

§ 90. Where, in a suit between A and B, judgment was rendered that A recover against B a certain sum, and that certain land be sold to satisfy the judgment; another claimant of the land, in order to obtain an injunction against the sale, must show by what title he claims, or that B had no title; must state facts showing that the judgment was obtained by

¹ *Wilson v. Butler*, 3 Munf. 559.

² *Poage v. Bell*, 3 Rand. 586. See *Bowyer v. Creigh*, 3 Rand. 25.

³ *Allen v. Freeland*, 3 Rand. 170.

⁴ *Kelly v. Wiseman*, 14 La. An. 661.

⁵ *Harper v. Hill*, 35 Miss. 63.

voluntarily, all the creditors shall be paid *pari passu*. Each creditor is therefore entitled to a proportionate share of the assets; and if one creditor commences an action or signs judgment after such resolution and notice thereof, he may be enjoined from issuing an execution. *Sablionière, &c.*, Law Rep. (Eng.) Eq., January, 1867, p. 72.

fraud and collusion between A and B ; and must allege that he is in possession, or that he will suffer loss or damage by the sale, and that he was ignorant of the pendency of the suit.¹

§ 91. A perpetual injunction may be granted to stay proceedings on a judgment at law, obtained in a suit brought in the name of a person not interested, for the purpose of preventing a defence, which the defendant had against the real plaintiff.²

§ 92. A judgment debtor who has been garnished may compel the creditor and the garnishee to interplead, and may have the execution enjoined until the interpleader is determined.³

§ 93. A defendant in replevin, who has given a forthcoming bond and holds the property, may have an injunction against a sale of the property on an execution against the plaintiff, without alleging that the property is his.⁴

§ 94. One of two coöbligors filed his bill for relief from a judgment, on the ground that the bond was usurious. Held, the other ought to have been made a party, or good reason suggested why he was not.⁵

§ 95. A and B confessed judgment in favor of C for the amount of a usurious note. A, who was only a surety, afterwards filed his bill in his own name alone against C, to be relieved from the judgment on the ground of usury. Held, B had a common interest with A in the subject-matter of the bill, and should have been made a co-complainant with him, unless some sufficient excuse for not doing so was stated ; and if there were a sufficient excuse, he should have been made a party defendant ; and, no reason being stated in the bill for the non-joinder of B, the bill was dismissed with costs.⁶

¹ *Henderson v. Morrill*, 12 Tex. 1.

² *Greenleaf v. Maher*, 2 Wash. C. 44, 393.

³ *Henderson v. Garrett*, 35 Miss. 554.

⁴ *Cooper v. Newell*, 36 Miss. 316.

⁵ *Macey v. Brooks*, 4 Bibb, 238. See *Kendrick v. Rice*, 16 Tex. 254.

⁶ *Boughton v. Allen*, 11 Paige, 321.

§ 96. When several complainants join in a bill, asking relief against a judgment at law, against which some of them show no ground for equitable relief, the bill is demurrable.¹

§ 97. When an injunction to a judgment is made perpetual at the instance of one defendant, who has been required to give a forthcoming bond, and it appears that there is no equity in favor of the other defendant, on whom the execution was not served; the court should so extend the decree, as to enjoin such defendant from availing himself of the return of the execution and forthcoming bond, to prevent proceedings against him on the original judgment.²

§ 98. Equity will not interfere at the suit of one of the defendants in a judgment at law, to compel the plaintiff to collect his judgment out of another defendant, who, by agreement with his co-defendant, had bound himself to pay it.³

§ 99. A bill, to restrain a judgment against a co-tenant in common should expressly charge the insolvency of the defendant.⁴

§ 100. An injunction upon a judgment on a bill of exchange against the acceptor does not enjoin suits against the other parties to the bill.⁵

§ 101. Where a creditor has obtained a decree against the estate of his deceased debtor, authorizing a levy upon the estate in whosever hands it might be, he will not be enjoined from proceeding against a part of the estate in the hands of specific legatees, on the ground that the testator set apart a portion of his estate for payment of his creditors.⁶

§ 102. Where a sheriff levied a *fi. fa.* upon the lands of a deceased debtor, founded on a judgment recovered during the

¹ *Tucker v. Holley*, 20 Ala. 426.

⁵ *Bohannon v. Combs*, 12 B. Mon.

² *Poindexter v. Waddy*, 6 Munf. 563.

418.

⁶ *Maxwell v. Maxwell*, Charl. R. M.

³ *Skinner v. Barney*, 19 Ala. 698.

462.

⁴ *McLendon v. Hooks*, 15 Geo. 533.

life of the debtor, without a *sci. fa.*; the court refused to relieve, on the ground that there was a remedy at law.¹

§ 103. A judgment suspended by an injunction may be revived on the death of either party; and the injunction operates on the judgment or *scire facias*, prohibiting the issue of execution thereon.²

§ 104. Where there has been a dismissal of a bill for an injunction against a judgment, and an *appeal*, it is irregular to apply in the appellate court, pending the appeal, for a new injunction to stay proceedings on the same judgment.³

§ 105. When application is made for relief against a judgment, upon facts in relation to which the proof is contradictory, it is in the discretion of the Court of Equity to decide the facts, or to send an issue to a jury.⁴ And where an injunction to a judgment was granted, on the ground of improper practices by the plaintiff with the jury, an issue was directed to ascertain the justice of the plaintiff's demand.⁵

§ 106. On a bill to enjoin a judgment, with a prayer for an account, where the defendant goes into the account, it is too late, after the testimony is closed, for the complainant to object that the court has not jurisdiction of the subject-matter of the account.⁶

§ 107. One of the most frequent occasions for enjoining a judgment arises in connection with *title to lands*. Thus an order of seizure and sale, to enforce payment of the purchase-money, may be enjoined, on the ground of a deficiency in the quantity of the land sold, which would entitle the vendee to a diminution of the price.⁷ So a vendee, with covenants of warranty, against whom a judgment is recovered on the notes given for the purchase-money, and who is afterwards

¹ Perkins v. Bullinger, 1 Hay. 367.

² Richardson v. Prince George, 11 Gratt. 190.

³ Graves v. Graves, 2 Hen. & M. 22.

⁴ Key v. Knott, 9 Gill & J. 342.

⁵ Humphries v. Blevins, 1 Overton,

36.

⁶ Head v. Gervais, Walker, 431.

⁷ Davis v. Millandon, 14 La. An. 868.

evicted through title paramount, may enjoin the judgment, when his vendor is insolvent, and the defence could not have been made at law.¹ More especially upon alleging the vendor's fraudulent representations of title.² And a statutory remedy, by *motion*, to supersede an execution, does not deprive the Chancery Court of its original jurisdiction to remove a cloud upon the title to land. Therefore a vendee, whose land has been sold under execution (issued on a judgment recovered against his vendor before his purchase), and bought in by himself, may come into equity to enjoin the collection of his bid, and all further proceedings under the judgment, upon an allegation that the judgment had been paid and satisfied before the issue of the execution.³ So A and B, brothers, and owners of adjacent tracts, agreed upon a marked line, transferring twelve acres to B, and afterwards sold the land, with reference to this line, to C, who had previously occupied the twelve acres. C made improvements, and sold to D, who also made improvements, of all which A had notice. E, a purchaser with notice from A, who conveyed without legal title, files a bill against the heirs of A's vendor, obtains a conveyance, including the twelve acres, and sells to F, who brings a writ of right against D for the twelve acres, and recovers judgment. Held, D was entitled to an injunction against this judgment.⁴ So the grantee of a judgment debtor may enjoin the collection of the judgment from the property granted, where it might be collected from other property still belonging to the debtor.⁵ So an elder patentee in possession brought his bill against the junior patentee, for an injunction to the execution of a writ of *hab. fac.* against his tenants, upon whom there had been no service of notice, and for a release of the claim. Held, that the bill might be sustained under the statute authorizing the holder of the elder grant to try the merits of the junior patent, though there could be no injunction to such an execution.⁶ But an injunction was refused in the following case: A, who was the equitable owner, under articles of agreement, of a tract

¹ Wray v. Furniss, 27 Ala. 471.

² Walton v. Bonham, 24 Ala. 513.

³ Brewer v. The Branch, &c., 24 Ala. 439.

⁴ Stafford v. Carter, 4 Gratt. 63.

⁵ Hurd v. Eaton, 28 Ill. 122.

⁶ Jones v. Chiles, 3 Monr. 340.

of land, on which a balance of purchase-money was due to B, his vendor, contracted to sell it to C, and to give him a clear and unencumbered title. For the purpose of carrying out his agreement, A procured from B a deed of the land, and gave his bond and warrant for the balance of purchase-money, and B, with knowledge of the contract between A and C, took from A an assignment of a contract between C and a third person, as collateral security for the payment of B's bond. Held, that these facts gave C no equity, as against B, to restrain him from levying on the lands, by virtue of the judgment entered on the bond.¹ And equity will not relieve against a judgment for the purchase-money of land, on the ground that the vendor had not title, where, at the time of sale, the vendor gave notice that there were doubts as to the validity of the title, but gave his warranty deed of the land, he being of undoubted ability to answer the warranty.²

§ 108. Equity has jurisdiction to enjoin a sale of land on execution, on the application of the owner of an equitable lien prior to the lien of the judgment; and, having thus obtained jurisdiction, the court will adjust the rights of all the parties.³

§ 109. The withdrawal of a claim to real estate does not affect the right of the claimant subsequently to file a bill, praying for a perpetual injunction against the levy of executions on such estate.⁴

§ 110. Equity cannot restrain a plaintiff, who has obtained judgment, on a writ of forcible entry and detainer, from having restitution of the possession, notwithstanding he is insolvent, and the complainant holds the undisputed legal title.⁵

§ 111. Similar questions arise in connection with the obligation of *suretyship*. Thus equity will, in favor of a surety, enjoin a judgment, suffered by him on the promise of the

¹ Dent v. Ross, 35 Penn. 337.

² Merritt v. Hunt, 4 Ired. Eq. 406.

³ Parker v. Kelly, 10 S. & M. 184.

⁴ Cox v. Mayor, &c., 17 Geo. 249.

⁵ Hamilton v. Adams, 15 Ala. 596.

creditor, that it shall only be used to enforce a settlement with the principal; and will give him relief if the judgment is too large.¹ So where, in consequence of representations made to him by the holder of a note, the surety upon it ceases to maintain a valid ground of defence, proceedings under a judgment so obtained will be enjoined.² But in the following case equity refused to interpose: The State Bank held a promissory note against A, upon which B was surety. A died insolvent, and, at the time of his death, the State, which owned the State Bank, was indebted to A as a member of the Senate, and otherwise. The General Assembly appointed an agent to receive the money due to A, and, after defraying his expenses, to pay over the balance to A's administrator. The surety notified the auditor to retain in his hands a sufficient sum to pay the note, which he did not do. A judgment was recovered against the surety in an action on the note, and thereupon he filed his bill in equity, praying that the judgment might be perpetually enjoined. Held, that the bill could not be sustained; that the assets of the bank were a fund for the payment of its creditors, and, however it might be in respect to the power of the Legislature to authorize the agent to receive the money and to apply it to the debts of the deceased before they were judicially determined, it had no right to retain any part of the money due to A, and apply it to the note, although the State was the real owner of the note.³

§ 112. The same remedy is applied in cases of *trust*. Thus a bill was filed for an injunction, alleging, that A made a deed of property in trust for himself and wife, remainder in trust for their children; that he was possessed, at the time of making such deed, of property far greater than the amount of his liabilities; that the defendant took a note from A, executed after the enrolment of the deed (of the existence of which deed the defendant was well aware), and has since taken out execution on a judgment on such note, and caused a levy to be made on the property conveyed in trust, alleging

¹ *Cage v. Cassidy*, 23 How. 109.

² *Dew v. Hamilton*, 23 Geo. 414.

³ *Pike v. The State, &c.*, 14 Ark. 403. (See chap. 20.)

that such conveyance was void as to creditors, and intending thereby to injure the sale of such property on the execution, to the irreparable injury of the complainants, the wife and child of the grantor. Held, the bill disclosed sufficient ground for injunction. Held further, that, on appeal from the order granting such injunction, the case must be decided on the bill alone, without reference to the answer.¹

§ 113. Various points of miscellaneous practice arise in connection with the injunction of judgments.

§ 114. An injunction to stay execution of a judgment at law is a release of errors in the judgment, by the Tennessee Statute of 1801, c. 6; although the complainant afterwards dismiss his bill.²

§ 115. Where a statute provides, that a party filing a bill, and obtaining an injunction to stay proceedings upon a judgment, shall release all errors in the judgment, and that no injunction shall be granted without such release; a party obtaining such injunction is estopped to deny his release of errors, the effect of such denial being to work a fraud on the opposite party.³ In Kentucky, it is irregular to grant an injunction to stay proceedings on a judgment at law without a release of errors, and such injunction may be discharged on motion; but it is no cause for reversing a decree making an injunction perpetual.⁴ But it is held that an injunction, to stay proceedings on a judgment in violation of law, does not operate as a release of errors.⁵ And where a bill is filed to enjoin a judgment without release of errors, the chancellor can do no more than dissolve the injunction on that account; he cannot dismiss the bill for that reason.⁶

§ 116. Where, on a bill to stay proceedings on a judgment, it appears from the report of the commissioner, that the complainant is entitled to a credit which the defendant had not

¹ *McCann v. Taylor*, 10 Md. 418.

² *Henly v. Robertson*, 4 Yerg. 172.

³ *McFarland v. Rogers*, 1 Wis. 452.

See *Dickerson v. Board, &c.*, 6 Ind. 128.

⁴ *Bradley v. Lamb*, Hardin, 527.

⁵ *Burge v. Burns*, 1 Morris, 287.

⁶ *Paulding v. Watson*, 21 Ala. 279.

given him; the bill ought not to be dismissed, because the complainant had neglected to carry into effect a previous order of the court, referring, by consent, the account to a different commissioner; but, the last order being made on the defendant's motion, and the report being excepted to for want of notice to the complainant, a new account ought to be ordered.¹

§ 117. In Texas, an application for an injunction, to stay proceedings on a judgment, must be made to the court in which the judgment was rendered, unless made by one who was not a party to the judgment, and whose residence is in a different county.²

§ 118. In Missouri, the county court having jurisdiction to enter a judgment sought to be enjoined, there is no authority to enter into an examination of its merits. An injunction is a release of errors at law, and the proceedings on it are not appellate in their nature.³

§ 119. Though the petition prays for an injunction, yet, if the matter was neither passed upon by the court below, nor in any way brought to its notice, the Supreme Court will not interfere.⁴

§ 120. Mere mistakes, in a bill of exceptions in chancery, are no ground for enjoining from the prosecution of a writ of error.⁵

§ 121. In a suit brought to enjoin the collection of a justice's judgment, after demurrer overruled, for want of verification of the complaint and of bond filed, trial by the court, and motion for new trial overruled; it is not error to allow the affidavit to be made and the bond to be filed, where no steps have been taken by the defendant to obtain a stay of proceedings or to have the complaint set aside.⁶

¹ *Roberts v. Jordans*, 4 Munf. 488.

² *Winnie v. Grayson*, 3 Tex. 429.

³ *Price v. Johnson County*, 15 Mis. 438.

⁴ *Barada v. Carondelet*, 16 Mis. 323.

⁵ *Ford v. Weir*, 24 Miss. 563.

⁶ *Denny v. Moore*, 13 Ind. 418.

§ 122. The precept of injunction is often applied directly to *executions* upon judgments at law ; and, in what has been said with reference to judgments, it has not been found practicable to omit some cases which would seem equally applicable to executions.¹ It remains, briefly to consider the decisions which relate to the latter alone.

§ 123. It is held, in general, that the jurisdiction of equity to enjoin a sale of real estate is coextensive with its jurisdiction to set aside and order to be cancelled a deed of the property.² So that, if a valid judgment at law be iniquitously used, equity will annul what has been improperly done under it.³ So chancery will grant an injunction to prevent a party's making use of a legal writ of execution for the purpose of vexation and injustice.⁴ Or restrain the sale of property illegally taken in execution.⁵ Or service of an execution issued too late.⁶ Or an execution issued on a judgment, the record of which has been destroyed, there being no renewal by substitution.⁷ (a)

§ 124. But, on the other hand, it is held, that equity does not, as of course, take executions upon judgments at law into its own hands, as such power would be oppressive both to the debtor and the court.⁸ And the presumption is, that the court which renders a judgment is competent to enforce it by its own process, and it is only in special cases that chancery interferes.⁹ Thus, that a court of law improperly issued a second execution, is an error not cognizable under a bill in equity for relief therefrom.¹⁰ So where a statutory writ of possession has been awarded by a court of law, to enjoin the issuing of such writ in favor of a purchaser of lands, at a sale under an execution against a party in possession, where there is no allegation or pretence that waste may be committed, or irreparable mis-

¹ See *Strong v. Daniel*, 5 Ind. 348 ;
Shiff v. Carpreth, 14 La. An. 801 ;
Sowle v. Pollard, 14 La. An. 287 ;
Gleises v. McHatton, 14 La. An. 560.

² *Pixley v. Huggins*, 15 Cal. 127.

³ *Bissell v. Bozman*, 2 Dev. Ch. 160.

⁴ *Colt v. Cornwell*, 2 Root, 109.

⁵ *Kenyon v. Clarke*, 2 R. I. 67.

⁶ *North v. Swing*, 24 Tex. 193.

⁷ *Cyrus v. Hicks*, 20 Tex. 483.

⁸ *Macon, &c. v. Parker*, 9 Geo. 377.

See *Macy v. Lloyd*, 23 Ind. 60.

⁹ *Ib.*

¹⁰ *Gregory v. Ford*, 14 Cal. 138.

(a) And the precise form of the petition is held immaterial. *Dearborn v. Phillips*, 21 Tex. 449.

chief done ; it is held to be a clear abuse of the writ of injunction.¹ So, where the object of a bill will be answered by restraining the proceeds of a sheriff's sale in his hands, the sale of the property ought not to be enjoined.² Nor merely on the ground that the validity of the execution or the justice of the judgment is denied by the party who applies for the injunction.³ So, where the plaintiffs sought to restrain the defendants from taking and selling on execution specific articles of property, on the ground that they consisted of family relics, family pictures, and gifts from deceased friends, of great interest and value to the plaintiffs ; and the only articles within that description, which had been levied upon, were four ottomans, four vases, a solar lamp, and a china tea-set, given, in the lifetime of the testator, to his wife (now his widow), by friends and relatives, as family presents ; and she was not a party to the suit ; and the plaintiffs did not offer to pay the value of the articles which they sought to protect : held, the court would not interfere. In such case it would not strengthen the plaintiff's claim, that the execution debtor had more than sufficient to pay all her debts, other than the property in question. And where the plaintiffs in such bill alleged, that the defendants threatened and were about to levy their execution upon the real estate of the deceased ; and that such levy would not only be illegal, but would greatly embarrass the settlement of the estate ; and it appeared, that the time limited for the settlement of the estate had long since expired, without any manifestation of a desire, by the plaintiffs, to complete the settlement : it was held, 1. That the interference of the court, in the manner claimed, would enable the plaintiffs, by their delay, effectually to shield the property of the debtor from the claims of her creditors ; 2. The levy of an execution upon her life estate in the realty would not affect proceedings in relation to the settlement of the estate concerning the personalty.⁴

§ 125. We now proceed to state the specific circumstances under which an injunction of executions has been granted or refused.

¹ *Blakeney v. Ferguson*, 14 Ark. 641.

² *Receivers, &c.*, 3 Green, Ch. 222.

³ *Williams v. Wright*, 9 Hump. 493.

⁴ *Johnson v. The Connecticut, &c.*, 21 Conn. 148.

§ 126. An execution sale may be enjoined, where it would cause a cloud on the title of the complainant.¹ And this, although a sale of only the debtor's "right, title, and will." So although in fact no title will pass thereby, the property not belonging to the execution defendant.² (a) So it is held, in general, that equity will interfere to prevent a sale under an execution against a third party.³ Or, in favor of one in quiet possession, as owner, enjoin a writ of possession on a judgment to which he was not a party.⁴ Or an execution against a third person, on which the sheriff is about to seize the plaintiff's stock in trade; upon the allegation that it will destroy his trade and credit, and deprive him of the means of support.⁵ So A, a young man, recently established in a profitable trade, conveyed and delivered his stock to B, being a miscellaneous retail stock, suitable for the season, and intended to be paid for from the sales. C, a creditor of B, levies an execution upon the goods, on the ground of a fraudulent transfer; and A applies for an injunction of such levy. Held, the sale being adjudged valid, a proper case for injunction, because the damages, if the property were not sold, would be limited to the injury done to it, or, if sold, to its value, when taken, with interest to the time of trial, and could not compensate loss of trade and credit, failure of business prospects, and commercial ruin, being collateral or consequential results of the seizure on execution.⁶

§ 127. But where property of A was levied on under an execution against B, and there was no allegation of irreparable injury, nor of the pendency of a suit at law, nor of other equitable ingredient to distinguish the case from a simple tort, for which adequate reparation could be made by the recovery of damages at law; it was held that equity had no jurisdiction

¹ Key, &c. v. Munsell, 19 Iowa, 305.

² Pixley v. Huggins, 15 Cal. 127.

³ Bell v. Greenwood, 21 Ark. 249.

⁴ Brush v. Fowler, 36 Ill. 54.

⁵ M'Creeny v. Sutherland, 23 Md. 481.

⁶ Watson v. Sutherland, 5 Wall. Amer. Law Reg., November, 1867, p. 61.

(a) It is elsewhere held, that, where a sheriff's sale would not pass any title to the purchaser, such sale will not be enjoined, on the ground merely that it would cast a cloud on the title. Drake v. Jones, 27 Mis. 428.

to enjoin a sale under the execution.¹ So in case of a bill for an injunction, to restrain the proceedings upon an execution levied upon goods in a store, claimed by the complainant under title from the judgment debtor, but not showing that the property is of such a character that its loss cannot be adequately compensated by damages at law.²

§ 128. It is further held, with reference to conflicting claims upon the property in question, that, where the title of a claimant is clear and unquestionable, chancery will enjoin a sale under an execution against a stranger.³ So the sheriff may be enjoined from paying over money received from the sale of an estate under executions issued by individual creditors, where it appears that the complainants had a specific lien on the estate, and a preference over individual creditors, and that the claim was pending and undetermined. (a) But the vendor cannot enjoin the seizure and sale of the property of his vendee, when it is seized under execution as the property of a third person, on the ground that his obligation in warranty may attach. In such a suit, the question of title to property is involved, and it therefore partakes of the nature of a *petitory* action, which can only be maintained by the party in whom the legal title is vested.⁴ And where one seeks to enjoin an exe-

¹ *Du Pre v. Williams*, 5 Jones, Eq. 96.

² *Lewis v. Levy*, 16 Md. 85; *Freeland v. Reynolds*, ib. 416.

³ *Capertown v. Huddleston*, 7 Hump. 452; *Read v. Dews*, Charl. R. M. 355.

⁴ *Kelly v. Wiseman*, 14 La. An. 661.

(a) Where the assignee of a judgment knew, as did also the sheriff, of the voluntary partition of the lands held in common by the judgment debtor and others, and that the lots apportioned to and accepted by the latter were abundantly sufficient to satisfy the judgment, with the expenses of sale, yet they proceeded to sell the lot set off on the partition to the plaintiff, one of the tenants in common, wholly regardless of her rights and equities; held, that this was a fraudulent act, though committed under the guise of legal sanction, and that an action would lie against the judgment creditor and the sheriff, to set aside the sale and cancel the certificate of the sheriff.

Also, that the plaintiff could have obtained an order before sale, directing the sheriff in the execution of the process, and after sale could have obtained relief by motion; that she had also a remedy by direct action, and, even if fraud had not been charged, proved, or found by the court, if facts were stated in the complaint, and were proved and found, from which fraud was in law necessarily deducible, she would be entitled to relief in such action. *Contine v. Clark*, 41 Barb. 629.

cution, on the ground that the property seized does not belong to the judgment debtor, but to him; no other issue can be made but that of ownership. An affidavit that the sheriff had "seized" the individual property of the defendant, without any description of the property, or statement of its value, is too vague to authorize an injunction, and a petition not sworn to cannot supply the defect.¹ So where the plaintiff claimed land of which he was in possession through A; against whom B, one of the defendants, had some years before recovered judgment, and levied on the land: held, in a bill to set aside the levy, the plaintiff was not entitled to an injunction.² So equity will not enjoin a levy on personal property, without exhausting the real estate upon which the execution is a prior lien, and which is otherwise encumbered; and a bill for that purpose alone is properly dismissed. The party has a perfect remedy at law, by motion to stay the proceedings until the land should be sold.³ So equity will not set aside an execution issued in favor of the defendants, against a firm, against whom the orators had a claim and subsequent attachment; on the ground that the defendant's writ was made returnable to a wrong term of the court, and because the execution was taken out against all the members of the firm upon a judgment confessed by one only.⁴ So a prior attaching creditor of personal property cannot, after judgment, be enjoined from selling the property under his execution at the suit of B, a junior creditor, unless he has legally agreed not to do it, and irreparable mischief will ensue.⁵

§ 129. As in case of judgments, *fraud* is doubtless a ground for the enjoining of an execution. And the fraud may be constructive, and in the nature of *estoppel*. Thus where one was induced to indorse a note, for the accommodation of the maker, by the assurance of the payee that it was a mere form, and that he should not be troubled about it, and afterwards suit is brought upon the note, and judgment obtained by default against the indorser; the judgment is binding. But when, after the judgment, similar statements were made by

¹ *McRae v. Brown*, 12 La. An. 181.

² *Hart v. Marshall*, 4 Min. 294.

³ *Farrell v. M'Kee*, 36 Ill. 226.

⁴ *Shedd v. Bank, &c.*, 32 Vt. 709.

⁵ *Domec v. Stearns*, 30 Cal. 114.

the parties holding it, and he was induced thereby to believe that he was not liable, and to abstain from securing himself when he might have done so, until the maker became insolvent; held, he was entitled to an injunction against enforcing the execution.¹ So A obtained a judgment against B, levied execution on lands, with notice of a superior equitable title in C to a part, and purchased at the sale. Held, that he took as trustee for C, and might be enjoined from proceeding on the judgment against C's share, and required to release such share to him.² But where A as principal, and B as surety, gave a note on an executory contract for the purchase of real property, in which a fraud was practised on A; it was held that a bill filed by B alone, praying for an injunction to stay an execution at law, and setting up no other equity, was defective in substance.³

§ 130. *Payment* is ground for an injunction of an execution. Thus where an insolvent plaintiff was endeavoring, by execution regular on its face, to enforce a judgment recovered in due form in a justice's court, which judgment had been paid and satisfied, and, from the want of a transcript of the record, the county court had no jurisdiction of a motion for relief, or power to issue a judge's order, and the defendant, if compelled to pay, would have no adequate remedy, and no action against the officer; held, equity might on an action in the nature of a bill in equity enjoin further proceedings, set aside the execution, and decree the judgment satisfied.⁴ So a bill in equity will lie to enjoin a sale on an execution, obtained by the creditor of A, a son of the owner of the estate, and levied upon what was claimed to be his interest in the estate of his father, who had died intestate, leaving real estate, but who before his decease had made an advancement to A, exceeding what would have been his portion of his father's estate.⁵ So an injunction lies to restrain the enforcement of an execution, where the claim upon which the action was founded was settled before the sitting of the court, but the action wrongfully entered, judgment recovered, and the exe-

¹ *Roberts v. Miles*, 12 Mich. 297.

² *Gutshall v. Salsberry*, Wright, 127.

³ *Emmons v. McKesson*, 5 Jones, Eq.

⁴ *Mallory v. Norton*, 21 Barb. 424.

⁵ *Dyer v. Armstrong*, 5 Ind. 437.

cution afterwards assigned.¹ So A purchased slaves of B. An execution against B had been returned fully satisfied; but shortly after the purchase the return was set aside, and, without notice to A, another execution issued and levied on the property. The court granted a perpetual injunction against proceeding further with the levy.² So A, as sheriff, and B, his successor, under subsequent levies of other executions, sold the land of the defendant, of which C became the purchaser, at the sale made by A, and D at that made by B. D paid no money on his bid, but received a deed from B, and D commenced an action against C, to recover possession. C and D compromised the suit, by D's executing to C a quitclaim to the land, and by C's confessing a judgment to D for the amount of his bid at the sale made by B, with the understanding that this judgment was not to be enforced, unless B should be compelled to pay the amount of the bid to some creditor whose execution was in the hands of B at the time of the sale, and should call on D for reimbursement. C then procured an assignment to himself of the only operative judgment and execution which could claim the money arising from sales, and D afterwards settled with B the amount of the bid, by delivering up to him evidences of debt which he held against him, and caused execution to be issued on the judgment confessed by C, and levied on his property. Held, equity had jurisdiction of a bill filed by C to restrain D from enforcing the judgment, and the answer of D, which merely denied that the judgment was confessed "upon the distinct agreement" alleged, was insufficient to authorize a dissolution of the injunction.³

§ 131. But, to maintain a complaint for injunction on the ground of payment, the fact must distinctly appear. Thus the defendant recovered a judgment against the plaintiff, upon which execution was taken out and delivered to an officer, and payment of it demanded. The plaintiff refused payment, but afterwards gave the officer a receipt signed by himself and A as for goods levied on, of greater value than the amount of

¹ Devoll v. Scales, 49 Maine, 320.

² Moore v. Barclay, 16 Ala. 153.

³ Sevier v. McWhorter, 27 Miss. 442.

the execution, to be delivered to the officer on a certain day at the sign-post, otherwise the amount of the execution to be paid. The officer advertised the goods to be then and there sold, but they were not then or ever delivered. Both the plaintiff and A had previously disposed of all their property, and nothing could be collected on the receipt. Before the day named, the plaintiff procured an injunction of proceedings upon the execution, which continued for more than a year, and, when dissolved, there was no property which could be levied upon. A levy being then made upon the body of the plaintiff, held, such levy should not be restrained by injunction, and that the judgment had not been either technically or equitably satisfied.¹ And an agreement, by a third person, with the defendant in the execution, to pay it off, is no ground for an injunction against the enforcement of the execution.²

§ 132. The question of *part payment* may also arise.

§ 133. An injunction on part of the funds in the hands of a sheriff is no reason why he should not pay over the remainder, to different judgment creditors entitled to it, *pro rata*.³

§ 134. When a judgment creditor is proceeding by execution to raise the full amount of his judgment, which has been in fact reduced by payments or otherwise, a subsequent execution creditor is entitled to restrain him from selling under the execution, until the payments are ascertained and credit given for them.⁴ When there is a dispute between the debtor and the prior creditor as to the amount of credits, the statements of the bill, as to what the credits should be, should not be taken as conclusive.⁵ An answer, admitting receipt of certain goods, but alleging that the defendants were forbidden to sell them for less than the invoiced price; that the goods were not worth this price, and were therefore in their hands subject to the debtor's order: does not authorize the dissolution of an injunction.⁶ Held, also, that these goods constituted a fund on

¹ Tuttle v. Bishop, 31 Conn. 511.

⁴ Peshine v. Binns, 3 Stockt. 101.

² Triplett v. Turner, 2 J. J. Mar. 475.

⁵ *Ib.*

³ Phillips v. Behn, 19 Geo. 298.

⁶ *Ib.*

which only the prior creditor had a lien, and that the later creditor was entitled to have them appropriated under a decree to the prior creditor's claim.¹ Held also, that, if the defendants' allegations were true, as to the terms upon which they received the goods, then the court would direct the manner of their disposal, and that their net proceeds should be credited.²

§ 134 a. A bill in equity cannot be maintained, to restrain collection of an execution in favor of the assignee of an insolvent debtor, on the mere ground that the plaintiff has claims against the debtor, which might be the subject of *set-off*; there being no averment to show that the plaintiff, for any reason, could not have availed himself of his right of set-off in the action in which the judgment was recovered.³

§ 135. As in case of judgments, the levy of an execution will not in general be enjoined, where the party might have effected the same object by availing himself of his rights at law. Thus the claimant of personal property, taken on several executions against the same person, cannot maintain a bill to enjoin the proceedings; his proper remedy is at law.⁴ So an injunction will not be granted, to stay a sale under an execution on the ground of usury, that being a good defence at law.⁵ Nor, as is sometimes held, upon the allegation that the judgment has been satisfied, the remedy at law, in such case, being prompt and adequate.⁶ So a bill for an injunction brought against the sheriff, to stop the sale of property on execution, alleging a *bonâ fide* purchase on the part of the complainant, previous to the execution; was dismissed, on the ground that the remedy was at law.⁷ So where personal property is improperly levied on, the party claiming it cannot enjoin the creditor from proceeding at law, on the ground that another person has interposed a claim to it by mistake. The true owner has an adequate remedy at law, by suit or interposing a claim, under the statute (of Alabama).⁸ So equity has no jurisdiction to enjoin the sale of property seized on execution, on the appli-

¹ Peshine v. Binns, 3 Stockt. 101.

² *Ib.*

³ Wolcott v. Jones, 4 Allen, 367.

⁴ Henderson v. Bates, 3 Blackf. 460.

⁵ Lansing v. Eddy, 1 John. Ch. 49.

⁶ *Ib.*

⁷ Kendrick v. Arnold, 4 Bibb, 235.

⁸ Marriot v. Givens, 8 Ala. 694.

cation of a third party, claiming it as his own, though he is a trustee of the property.¹ And, in general, a debtor cannot resort to equity to enjoin an execution against him, if he has had an opportunity to apply to the court from which it issued for redress.² And it is held, that it would take a very strong case of fraud, mistake, surprise, or accident, to induce equity to interfere with the completion of a sale upon an execution at law.³ Thus equity will not grant relief against an execution, if the party can equally well be relieved, upon motion, in the court that issued the execution or has control of it.⁴ As where execution issues against a party who has never been served with notice of an action before a justice; inasmuch as he might move the justice to set it aside, and have an appeal, if seasonably claimed, from a denial of this motion; or, if not, a review by certiorari.⁵ So upon a bill in chancery, by a replevin-bail, to enjoin the proceedings upon an execution which had been levied on property of the complainant, on the ground that a prior execution, issued on the judgment, had been levied on property of the principal, a bond for the delivery of the property forfeited, and a judgment recovered against the principal and surety on the bond, upon which an execution had been issued, and a part of the judgment collected but not credited; it was held that the proper remedy was to have made a motion in the circuit court to set aside the execution.⁶

§ 136. Upon similar grounds, after refusal to grant a new trial, equity will not restrain the execution upon the same facts on which the motion for a new trial was made.⁷

§ 137. So injunction cannot be substituted for a writ of error or an appeal. Thus September 1850 A recovered judgment against B, in the (Minnesota) district court, upon confession, under a warrant of attorney, and in March, 1859, procured an order for an execution. B unsuccessfully moved to set aside the execution for irregularities in the entry of judgment. The execution was levied upon property of his

¹ *Watkins v. Logan*, 3 Mon. 20.

² *Beekley v. Palmer*, 11 Gratt. 625.

³ *Skillman v. Holcomb*, 1 Beasl. 131.

⁴ *Imlay v. Carpentier*, 14 Cal. 173.

⁵ *Comstock v. Clemens*, 19 Cal. 77;

Partin v. Luterloh, 6 Jones, Eq. 341.

⁶ *Cline v. Lowe*, 3 Ind. 527.

⁷ *Collins v. Butler*, 14 Cal. 223.

successor in interest, who enjoined the sale, and sought to annul the judgment for irregularity, and as not giving a lien. Held, the judgment was valid, till reversed upon appeal or error, or unless relieved against within a year from its rendition for mistake, inadvertence, surprise, or excusable neglect of B.¹

§ 138. And, in general, the party complainant must have availed himself of his legal rights, and cannot set up any equity, as ground for an injunction, consisting in facts of which he had full notice. Thus in February, 1858, A recovered judgment against a gas company for labor on their building, with order for a mechanic's lien, and in April, 1859, the property was sold to B for the benefit of the plaintiffs, the company's creditors, to whom he assigned the sheriff's certificate. About the same time, the property was sold under trust deeds of the company, and purchased by B for the same parties. December, 1856, C recovered judgment against the company for work, which was affirmed on appeal, and in July, 1858, he had a *nunc pro tunc* order for a mechanic's lien on the property sold to B. Execution was issued on C's judgment, and levied, and the plaintiffs pray to have it enjoined. Held, as they had notice, they could not avail themselves of the fact, that the lien was not recognized in the entry of judgment. Also, that the lien, dating from the commencement of the work, was not discharged by the appeal or *nunc pro tunc* order.² So where a party enjoins a seizure, upon the ground that the judgment is null and void, because it was rendered and signed at chambers; he should deny under oath, that either he or his counsel consented to the submission of the case to the judge to be decreed at chambers, before he attempts to avail himself of the omission of the clerk to enter such submission upon the minutes of the court, or complains that it was not reduced to writing, and signed by the parties and their counsel.³

§ 139. With reference to the proper *parties* in a proceeding of this nature; it is held that a bill to stay proceedings upon

¹ Marshall v. Hart, 4 Min. 450.

² Rust v. Faust, 15 La. An. 477.

³ Julien, &c. v. Hurley, 11 Iowa, 520.

an execution is addressed to the execution creditor, instead of the officer, and such creditor should be a party to the bill.¹

§ 140. Where the seizure of land was enjoined, upon the ground that the plaintiffs in injunction had acquired such land at a sheriff's sale, and the defendant raised the objection of want of registry of such sale in the recorder's office; it was held, that, where the evidence disclosed no title in the seised debtor, the defendants having no interest in the matter, this objection could not be urged by them.²

§ 141. At the trial of a replevin, brought by A, of property in the hands of an officer under an execution against B, judgment was rendered for the officer for the full value of the property, which exceeded the amount of the original execution. Held, that the assignment by B of his interest in the surplus of the property, after satisfaction of the execution against him, to A, gave A no equitable right to enjoin the officer from collecting the whole of the judgment against him.³

§ 142. Questions have often arisen in reference to *successive* executions.

§ 143. Where, pending an issue to try the right to personal property taken on execution, other executions are issued on the same judgments, and levied on the same property, an injunction will be granted to restrain proceedings on the latter.⁴ So an injunction will issue, at the instance of an execution creditor, to restrain the debtor and a prior execution creditor, from selling or removing any of the personal property levied on, unless by sale under the execution, until the second execution is satisfied.⁵ So A and B had severally attached certain personal property of C, the attachment of A having precedence, and both had obtained judgment, the property being, however, insufficient to satisfy either judgment. On a petition brought by B against A, praying that A be enjoined

¹ *Bean v. Blanton*, 3 Ired. Ch. 59.

² *Maillon v. Lynch*, 15 La. An. 547.

³ *Hohenthal v. Watson*, 34 Mis. 183. 258.

⁴ *Huntington v. Bell*, 2 Porter, 51.

⁵ *Edgar v. Clevenger*, 1 Green, Ch.

against levying his execution on the property, it having been found by the court that B's judgment was based on a just and legal claim, but that A's judgment, though nominally based on a payment of money for C, was yet founded wholly on a liability of A as maker of a note indorsed by C and by one F, and which C had agreed but had failed to pay; held, the judgment of A ought to be postponed, and the injunction was granted.¹ So, between 1832 and 1839, judgments were rendered against A and his sureties. In October, 1839, the defendants A, B, and C, conveyed their property in trust, to sell and pay judgment and other creditors, according to their legal priorities. In 1840 and 1841, the trustees sold parcel of the estate to E, and the purchase-money was applied by him in discharge of elder judgments, which were thereupon assigned to the purchaser. A full and fair value was paid for the land. In 1838, F and G obtained judgments against A and others, and, in 1844, revived them by *scire facias* against A and his terre-tenants, of whom E was one. The judgment of F and G was junior to those paid off by E. The purchaser, when the *sci. fa.* issued, was a non-resident, and not returned *summoned* under that writ. The judgment being revived, F and G were proceeding to a sale of the land, under the lien of their judgments of 1838. It appearing that the amount of the judgments, prior to 1838, was more than the value of the whole estate; it was held that an injunction obtained by E should be continued until final hearing, unless F and G would bring into court the sum paid by E in discharge of the senior judgments. That the defendants, F and G, not having assented to, nor participated in, the formation of the trust created by A, B, and C, nor having ratified it, were not bound by it. That the complainant, E, having no defence at law, could not have successfully pleaded to the *scire facias*, or have maintained payment, satisfaction, or release of the judgment of F and G at law, or that A was not seized at the rendition of the judgment. But, that in equity, as no combination, fraud, or unfairness, appeared in the purchase of the land, as it was sold for its full, utmost value, as the whole purchase-money had been applied

¹ Norton v. Hickok, 25 Conn. 356.

by the purchaser to the judgments prior in date, and preferred liens to the land, as there then remained due on judgments a large amount against A, prior in point of date to the judgment of F and G, and as the payment of the judgment of F and G, out of this land was hopeless; the purchaser was entitled to relief by injunction, as against such revived judgment, and execution thereon.¹ But on a bill to enjoin an execution against particular property, the allegation, that a prior execution in favor of another plaintiff against a part of the same defendants had been enjoined, is not ground for equitable relief, it not appearing but that the ground for the prior injunction had reference to the judgment or process itself, and not to the property.² And two executions of the same kind may be issued upon the same judgment, and, as courts of law have authority to prevent abuse of their own processes, equity will not interfere for that purpose.³ (a)

¹ Barnes v. Dodge, 7 Gill, 109.

³ Elliott v. Elmore, 16 Ohio, 27.

² Dunn v. Bank, &c., 2 Ala. 152.

(a) The following recent case is found in the (Philadelphia) Legal Intelligencer. Ritter v. Brendlinger et. al. In Equity. Opinion by Agnew, J. "This is rather a novel proceeding. One who is a subsequent judgment creditor, and an assignee in trust for creditors of the defendant in his judgment, seeks to restrain a prior judgment creditor of the same defendant from using his execution to collect his debt. The only ground alleged is, that the prior judgment creditor used the cancelled stamps of a former note to place upon the single bill upon which his judgment was afterwards entered. It is difficult to know what head of equity this belongs to. There is no allegation that the note is a fraud, or that the debt represented by it is not justly due, except the averment in the bill that the defendant in the judgment says he has a defence to the note on the merits. It is not alleged that there is any fraudulent collusion between the plaintiff and the defendant in the judgment, to hinder or delay his creditors. The real case, as it appears in the bill and answer, is an attempt of one creditor to stay the execution of another on the ground that the single bill was not duly stamped. It is not easy to see what he has to do with that. The judgment is not void which was finally entered upon the bills. The judgment is the act of the court, and if erroneous the error can be reached only by the party defendant. No stranger can contest it, and especially in this collateral way. If the defendant has not moved to set aside the judgment, certainly the plaintiff in this bill cannot complain for him or for the government. The plaintiff having a judgment unimpeached for fraud upon the rights of creditors standing upon the record unreversed and in full force, no other judgment creditor can intervene for the government or for the defendant. As a purchaser the plaintiff in the bill has no better right. He took subject to the lien of the judgment and as a mere volunteer for the use of creditors and his title must give way to the judgment. If

§ 144. A few miscellaneous points remain to be noticed.

§ 144 a. Where an injunction to stay the sale of particular property on execution, but not in any way affecting the judgment or the collection of it out of other property, is dissolved, no decree ought to be rendered against the complainant.¹

§ 145. Where property, in possession of a debtor under a parol loan, for more than five years, was levied on for his debt; on a bill to enjoin the sale by the owner, an issue was granted to try the question whether the claim of the execution creditor was fair or fictitious.²

§ 146. Where a sheriff, with full knowledge of the facts, neglects to levy an execution upon the property of the principal, and proceeds first upon the property of a co-defendant who is only a surety; it seems that the Court of Chancery, upon a bill filed for that purpose, will relieve the surety, if the surety cannot obtain satisfaction for the injury by an action upon the case against the sheriff.³ (See Chap. XX.)

§ 147. Where an injunction has been issued to prevent the completion of a levy against one charged as trustee upon default, the case will be retained, after a new trial has been granted the trustee, for the purpose of controlling the injunction and of determining the ultimate question of costs.⁴

§ 147 a. Where an injunction is granted on a judgment, and afterwards dissolved, and the judgment is collected pending the bill, the court, on final decree perpetually enjoining

¹ *Hammond v. St. John*, 4 Yerg. 107.

² *Beale v. Digges*, 6 Gratt. 582.

³ *Boughton v. Bank, &c.*, 2 Barb. Ch. 458.

⁴ *Nashua, &c. v. Stimpson*, 35 N. H. 286.

he has made a good sale and wishes to preserve it, all he has to do is to pay off the judgment and thus rid himself of its incumbrance. But without any charge of fraud in the contracting of the debt, he cannot stay rightful proceedings upon the judgment."

the judgment, may decree the money to be refunded, though there is only a prayer for general relief.¹

§ 148. An injunction will not be granted upon an execution issued against the complainants, as securities on a twelve months' bond, given under the 17th section of the (Texas) execution law of 1840, for a purchase of land sold under *feri facias*, and admitted by them to have been forfeited; on the ground that the execution had been issued without the authority of any court of justice, and without the sanction of the judicial tribunals of the land; nor upon an allegation that the complainants "are informed and believe that the bond on which said execution was issued was not taken in conformity with law, and is not such a one as execution could issue on."²

§ 149. Where a sheriff, who had levied upon perishable personal property, was restrained by injunction from selling; the injunction was so modified, as to permit the sheriff to sell, and pay the proceeds into court, to abide the event of the suit.³

§ 150. A bill to enjoin an execution, on the ground that a previous execution on the same judgment had been levied on the property of another defendant, must be filed in the county where the judgment was recovered. Objection to the jurisdiction may be taken at the hearing.⁴

§ 151. Where there is no equity in a bill to enjoin a sale on execution, it is not proper to decree a sale under the execution; the bill should be dismissed and the injunction dissolved.⁵

§ 152. It is held that a sheriff's sale, which would not pass any title to the purchaser, will not be enjoined, on the ground merely that it would cast a cloud on the title.⁶ (See § 125.)

¹ Bryan v. Primm, Breese, 33.

² Bryan v. Knight, 1 Tex. 180.

³ Heath v. Hand, 1 Paige, 329.

⁴ Beckley v. Palmer, 11 Gratt. 625.

⁵ Lovett v. Longmire, 14 Ark. 339.

⁶ Drake v. Jones, 27 Mis. 428.

§ 153. In a suit to enjoin an execution (in Texas), on the ground that the judgment has become dormant, the defendant may plead the judgment in *reconvention*.¹

§ 154. After a sheriff had sold property on an execution, and received the money therefor, an injunction was issued to stay further proceedings "until the further order of the court." Subsequently the county court passed an order to the sheriff, to pay the money over to the owner of the property. Held, this order was erroneous, because the injunction had not been made perpetual.²

§ 155. The (Ky.) civil Code has changed the mode of procuring an injunction or *supersedeas*, but not its force and effect, when obtained. When execution of a *fieri facias*, which has been levied, is thus stayed, such levy is released, the lien is discharged, and the officer should return the subject-matter levied upon or the money, if it has been sold and the money not paid over to the plaintiff, to the defendant.³

¹ Oldham v. Erhart, 18 Tex. 147.

³ Keith v. Wilson, 3 Met. (Ky.) 201.

² Dail v. Traverse, 8 Gill, 41.

CHAPTER VI.

INJUNCTION OF SUITS OR ACTIONS.

1. General jurisdiction.
2. Statutory authority, limitation of.
3. Injunction of suit and judgment; distinction.
4. Grounds of interference.
9. Injunction of suit in chancery.
10. Defence at law, whether and how far a bar to injunction.
15. Injunction in case of inequitable evidence.
16. Aid of suit at law.
19. Parties.
24. Terms.
26. Injunction and discovery, connection of.
29. Foreign suit.
36. Suits in other courts; conflicting jurisdiction.
41. Restraint of litigation.
43. Amount, as affecting injunction.
- 43 b. Set-off.
45. Cases relating to real property.
58. Estoppel.
61. Fraud.
64. Mistake.
67. In case of officers.
68. Executor.
69. Appeal.
70. Practice.

§ 1. THE injunction of *suits before judgment* is as common and familiar a head of equity jurisdiction as that of judgments.¹ (a)

¹ See *Ragatz v. Dubuque*, 4 Iowa, Gordon, 231; *Honeywood v. Selwin*, 343; *Dalglish v. Jarvie*, 2 MacN. & 3 Atk. 275.

(a) Some topics analogous to the main subject of this chapter may properly be noticed in the present connection. Where a second bill is filed, after dismissal of a first, or allowance of a demurrer, a *court of law* will stay the proceedings till the costs are paid, and in this respect equity follows the law. *Urdike v. Bartles*, 2 Beasl. 231. Where a suit is voluntarily discontinued, or ended by the plaintiff's neglect or default, and a new one brought for the same cause, or to

§ 1 a. It is held, that the great purpose of a court of equity, in assuming jurisdiction to restrain proceedings at law, is to afford a more plain, adequate, and complete remedy for the wrong complained of than the party can have at law.¹ (a)

¹ *Glenn v. Fowler*, 8 Gill & J. 340.

try the same question ; both in law and equity, the second suit may be stayed, till the legal costs of the first are paid. *Sears v. Jackson*, 3 Stockt. 45. But the rule does not apply, where by the terms of a trust the cestui is authorized to appoint a successor to the trustee, who dies, after suing to foreclose a mortgage, which constitutes the trust fund ; and the suit thereby abates, and a new one is brought by such successor. *Ib.* "Where the objects" (of a bill in equity and a suit at law) "are so far the same, that what is sued for in this court (equity) brings with it, as a necessary consequence, that which is sought to be recovered by the action, although they are not technically the same, the court will treat them as identical," and compel an election. But this rule was held not to apply, where the plaintiff (acceptor) filed a bill against the defendant (drawer) for the cancellation of bills, which were accepted in part fulfilment of a contract, of which the defendant failed to perform his part, and for an injunction against disposing of or suing on the bills ; and, pending the suit, the plaintiff commenced an action against the defendant for breach of such contract. Equity cannot give any relief for the loss arising from such breach, except under Lord Cairns' act, which permits but does not require a plaintiff in equity to claim damages as part of the relief sought. *Anglo-Danubian Co. v. Rogerson*, Law Rep. (Eng.) Eq., July, 1867, p. 2. "After an answer has been put in, and the plaintiff proceeds at law, the defendant may then require to elect in which court he will sue ; but I never heard that after a decree had been pronounced whereby the subject of the cause had been attached in this court, that the plaintiff has been permitted to proceed at law for the same matter ; particularly without making any application to the court. Where a decree has been pronounced, and the party obtains the relief he prayed, it is a contempt of the court to proceed at law, and on that ground I grant the injunction." Per Lord Manners, L. C., *Mocher v. Reed*, 1 B. & B. 319. In case of a suit at law and judgment, and a bill in equity for the same matter ; upon the coming in of the answer, the following order was entered : "*Ordered*, That the motion for dissolving the injunction be denied and that the plaintiff, within eight days after notice of this decretal order, elect whether he will proceed at law under the said judgment, or in this court, in this suit ; and that if he elects to proceed at law, the bill shall thereafter stand dismissed with costs ; and if he elects to proceed here, it is then further *ordered*, that he proceed no further by execution, or otherwise, on the judgment, without the leave of this court first had and obtained," &c. *Rogers v. Vosburgh*, 4 John. Ch. 83.

(a) The remedy of injunction is sometimes applied to criminal prosecutions. Thus the agents of a receiver in a cause, acting under leave of the court, took forcible possession of a house occupied by a servant of one of the defendants. An order was made, restraining that defendant from prosecuting an indictment against the agents. *Turner v. Turner*, 2 Eng. Law & Eq. 130. In New York, equity may restrain a creditor from proceeding, under the act abolishing imprisonment for debt, and to punish fraudulent debtors, against the person and equitable interests of his debtor. *Frost v. Myrick*, 1 Barb. 362. See chap. 1, § 1, n.

Thus it will interpose, to correct or prevent the abuse of the process of common law courts.¹ But in general equity will not interfere with other courts.² And equity will restrain proceedings at law when necessary to the attainment of justice, not by assuming jurisdiction over the courts in which the proceedings are pending, but by controlling the parties to such proceedings by injunction.³ In an approved work upon this subject, it is said: "It frequently happens that a person, in consequence of some circumstances of which judicial notice can only be taken in a court of equity, has an advantage in proceeding in a court of ordinary jurisdiction, which must make that court an instrument of injustice. There are also many cases in which the legal defence to a claim set up at law rests either exclusively or in a great degree within the knowledge of the party advancing the claim, by which means that defence can only be obtained through the assistance of a court of equity. As it is against conscience, therefore, that the party should in the one case make any use of the advantage of which he is thus inequitably possessed, or that he should in the other proceed in the assertion of his claim, without communicating the information, it has become one of the most ordinary modes of equitable interposition to afford relief by *injunctions to stay proceedings at law*." ⁴ So it is said, in a late case, "Injunction to restrain proceedings at law is one of the most common heads of equity jurisprudence. It is a preventive remedy. It is not used for the purpose of punishment, or to compel persons to do right, but simply to prevent them from doing wrong. Where the right of the plaintiff is doubtful, or where he has an adequate remedy at law, injunction will not be granted; but where the right is clear, and the danger probable that the right will be defeated without this special interposition of the court, it will in general be granted." ⁵

§ 2. The restraining of suits at law is a power inseparably incident to courts of equity, but will not be exercised by a court of law, invested by statute with specific and limited

¹ *Morris v. Thomas*, 17 Ill. 112.

⁴ 1 Eden (Am. Ed.), 14.

² *Bank, &c. v. Rutland, &c.*, 28 Verm. 470.

⁵ Per Woodward, J., *Miller v. Gorman*, 38 Penn. 312, 313.

³ *Burpee v. Smith, Walker*, Ch. 327.

equity jurisdiction. Thus the court in Massachusetts remark : " We have no power in chancery, except by statute ; and the general authority to issue injunctions has not been given. The exercise of such a power exists only when the subject-matter falls within the jurisdiction granted by the legislature. Injunctions against proceeding at law are within the general jurisdiction of chancery, which we are not authorized to assume." ¹

§ 3. We have already considered the remedy of injunction, as applied to *judgments*. This is said to be the form in which equity commonly interferes with proceedings at law. It is held to be the ordinary course to restrain the *execution*, but allow the plaintiff to proceed to a trial and judgment ; and that it is only upon an averment in the bill, that the plaintiff in equity believes the answer will afford discovery material to his defence at law, that an injunction to stay the trial ought to be granted.²

§ 4. With regard to the circumstances under which equity will interfere to restrain a suit at law ; it is held that an injunction will never be granted to stay a suit before judgment, merely because the plaintiff has *no cause of action*.³ So an injunction to stay proceedings at law, because another bill was pending, which embraced the same cause of action as that asserted in the suit at law, was held to have been improvidently issued, and to be properly dissolved on motion. The proper course would have been, to file a petition, or make a motion, for the injunction, in the suit already pending.⁴ So equity will not restrain a creditor from prosecuting his legal remedy against the personal representatives of his debtor, unless there is a decree under which the creditor has a right to go in and prove his debt.⁵

§ 5. Where the equity of a bill is fully met and distinctly denied, proceedings at law will not be restrained, unless

¹ Per Parker, C. J., *Stone v. Hobart*, 8 Pick. 466. See Gen. Sts.

² *Williams v. Sadler*, 4 Jones, Eq. 378.

³ *Chadoin v. Magee*, 20 Tex. 476.

⁴ *Washington v. Emery*, 4 Jones, Eq. 29.

⁵ *Ellicott v. The United States*, 7 Gill, 307.

under special circumstances.¹ Nor if an application for an injunction, *pendente lite*, leaves the plaintiff's case in great doubt.²

§ 6. The jurisdiction of a court of equity, to enjoin proceedings of a special nature in other tribunals, is sometimes very liberally construed. Thus a statute provided, that no order of the poor law commissioners should be removed by *certiorari* into any court of record except the King's Bench, and that every order removed into that court should, until declared illegal, continue in force and be obeyed. Held, equity might still restrain the commissioner and the guardians of a union from acting upon an order, pending a *certiorari*. That the effect of the statute was, merely that the removal of an order by *certiorari* should not of itself be conclusive of its illegality, leaving to an individual his right to an action of trespass or any other legal remedy.³

§ 7. But, on the other hand, a more strict construction has been given to the power of a court of equity in this respect. Thus chancery has no jurisdiction, to restrain *quasi* criminal proceedings on the part of the municipal authorities of a city, for repeated violation of an alleged invalid ordinance.⁴ And in a suit to set aside, as irregular, proceedings in progress under authority of law, which may affect the title to property; the complainant must point out and establish the defects in the proceedings; otherwise, the court will leave him to his remedy at law. Such proceedings will not be arrested, nor will a corporation be required to show their regularity, upon a mere suggestion or general allegation of illegality or irregularity.⁵ And where the defendant in an alternative mandamus exhibited a bill in equity, alleging an equitable defence to the demands of the plaintiff, and praying for an injunction, and that the bill might be received as a return to the writ; the injunction was refused, and a return ordered.⁶

¹ Brett v. Sellers, 27 Geo. 185.

² Fredericks v. Mayer, 1 Bosw. 227.

³ Frewin v. Lewis, 9 Sim. 66.

⁴ Burnett v. Craig, 30 Ala. 135. See

p. 1.

⁵ Williams v. Detroit, 2 Mich. 560.

⁶ Neuse, &c. v. Commissioners, 6 Jones, 204.

§ 8. A suit to recover a debt will not be enjoined, merely because the plaintiff in such suit has *security for the debt*. Thus a debtor sold his creditor certain goods, which were to be a satisfaction of the debt, unless they were taken from him by superior liens. Held, the debtor could not enjoin the creditor from proceeding to judgment on his claim, without showing that there were no superior liens outstanding, as the creditor had a right to reduce his claim to judgment, though he could not collect it so long as he held the goods.¹ So equity will not enjoin proceedings at law on a mortgage, before hearing the party against whom the injunction is prayed.² So, although equity has undoubted authority to compel a creditor to satisfy his debt out of a particular fund, to which he alone can resort; yet it will never do so to the injury of such creditor, or where that course will work injustice to other parties. The protection of the creditors in their just rights, and also the rights of others, is the primary duty of the court.³ So, on a motion by the defendants for a new trial, in an action upon a special contract, the Supreme Court of Errors decided, that the Superior Court had erred, in instructing the jury that the defendants were estopped, by the facts proved by the plaintiff, from alleging that they had no power to make the contract declared on, and advised a new trial. The plaintiff brings his bill to restrain the defendants from further prosecuting such motion for a new trial, on the ground, that the defendants by their representations had induced the plaintiff to enter into the contract and alter his condition, and therefore that the defence was inequitable and unconscientious. Held, 1. That the question whether, upon the facts proved on the trial, it was competent for the defendants, and consequently would be, on another trial, to set up that defence, was not involved in the bill. 2. That the defendants would not be estopped in equity, any more than at law, from setting up the defence. 3. That, inasmuch as the plaintiff could have adequate protection at law on such new trial, if he was entitled to it anywhere, there was no occasion for him to come into

¹ *Camp v. Matheson*, 29 Geo. 351.

² *Todd v. Pratt*, 1 Har. & J. 465. See chap. 28.

³ *Morrison v. Kurtz*, 15 Ill. 193. See *Dewey v. Bulkley*, 1 Gray, 416; *Hilliard on Mortgages* (3d ed., chap. 13).

equity for that purpose, and consequently such bill was not maintainable.¹

§ 9. In reference to the restraint of *a suit in chancery*, it is held that proceedings in the Court of Chancery will not be restrained by injunction upon an original bill, whether filed by a party privy or stranger to such bill; but the proper course is to apply by petition in the original suit.² So an injunction will not be granted, to restrain a party from instituting proceedings in equity for an account, &c., where the complainant has an equitable defence to such proceedings, which he can set up in his answer.³ But the court by which a receiver is appointed will restrain him from prosecuting an unjust and vexatious suit at law, although the complainant is not a party to the suit in which the receiver was appointed.⁴ So, where a bill has been filed and decree made for an account, and a creditor comes in before the master, but afterwards brings an action; such action will be enjoined, but without costs, if he has not applied in the first instance.⁵ And a plaintiff is bound to put under the control of the court his rights relating to the subject-matter of litigation. Therefore, where a party brought a suit for specific performance, and, after obtaining a decree, an action for damages, an injunction was granted.⁶ (a)

§ 10. No injunction lies against a suit, if the bill shows a good defence to such suit; or if it otherwise appears that there was such a defence. As, by a creditor, who has received payment from his insolvent debtor, to enjoin the prosecution of a suit against the debtor to recover the amount of such payment; the bill alleging that the payment was not an unlawful

¹ Hood v. New York, &c., 23 Conn. 609.

⁴ Matter of Merritt, 5 Paige, 125.

² Smith v. American, &c., 1 Clarke, 119, 163.

³ 307; Lane v. Clark, 1 Clarke, 309.

⁵ Hardcastle v. Chettle, 4 Bro. Ch.

⁸ Hall v. Fisher, 1 Barb. Ch. 53.

⁶ Prothero v. Phelps, 35 Eng. Law & Eq. 518.

(a) The expression "equitable grounds," in St. 17 and 18 Vict. c. 125, § 83, means grounds depending on *equitable principles*, not merely on the *practice of courts of equity*. Held, therefore, in the above case, that a plea of the decree in equity was not such a plea as the statute contemplated, and that its being overruled by a court of law did not preclude a court of equity from granting an injunction. 35 Eng. Law & Eq. 518.

preference.¹ So, where a defendant at law filed his bill in equity, praying for an injunction on proceedings at law to recover on a note, which he alleged to be usurious, but there was no allegation of any defect in his means of establishing his defence at law, nor any prayer for a discovery; held, the bill could not be sustained. Neither can a bill be sustained for the purpose of restraining such action, on the ground that the plaintiffs therein, a corporation, had no authority under their charter to receive the note, and that the transaction was a violation of the restraining act; it not being shown that the defence was unavailable without the aid of a court of equity. Though the decree, refusing to entertain jurisdiction, should provide, that the plaintiff shall be entitled to the benefit of the grounds of defence, upon which he relies, upon the trial at law.² So a bond was made, with penalty, for the conveyance of land within a certain time, and an action brought thereon by the obligee for the benefit of his assignee. The obligor then conveyed a good title to the assignee, who accepted the deed, subject to, but not waiving, his claim for failure to convey at the time agreed. On an application for injunction of the suit, held, the acceptance of the deed was either a complete defence at law, or could be shown in mitigation of damages; and the injunction was refused.³ And where the present plaintiff has a good defence at law, the mere neglect of the defendant in chancery to object to the jurisdiction of the court on this ground will not entitle the complainant to a preliminary injunction, and thus make it the duty of the Court of Chancery to assume the exclusive jurisdiction of the subject-matter of the suit. But, after a final decree, the court will restrain, by injunction, any proceedings at law inconsistent with such decree, and a clause to that effect will be inserted in the decree.⁴ More especially, if a defendant has a legal defence to a suit, and ample means of proving it, chancery will not interfere by injunction.⁵ Nor where the petitioner, if, as alleged, he is defrauded in such suit, has a remedy by *certiorari*.⁶ As in

¹ Fuller v. Cadwell, 6 Allen, 503; Hood v. New York, &c., 23 Conn. 609; 26 Geo. 167; New York, &c. v. American, &c., 11 Paige, 384; 20 Tex. 661.

² Minturn v. Farmers', &c., 3 Comst. 498.

³ Beauchamp v. Putnam, 34 Ill. 381.

⁴ 11 Paige, 384.

⁵ Chambless v. Taber, 26 Geo. 167.

⁶ Smith v. Ryan, 20 Tex. 661.

case of an action of forcible entry and detainer brought before a justice of the peace, although the land is worth more than \$100.¹ And, in cases of doubt, an injunction *pendente lite* ought not to be granted, unless there is reason to believe that, during the necessary delay before trial, the plaintiff may sustain injury which the court will be unable fully to redress, or that acts may be committed which will prevent the full relief which the plaintiff seeks by his action.² Thus, pending a suit on a note, though the defendant was not served and has not appeared, he cannot have an injunction against the collection of the note, merely on the ground that he has a good defence.³ So one injured by the worthlessness of a patent assignment, delivered as good, has a remedy at law against his vendor, and therefore equity will not enjoin a suit on the notes for the purchase-money, in the absence of some equitable ground, such as insolvency.⁴ So an injunction will not be granted, to stay a suit at law for breach of warranty of seisin, upon the ground of the loss of an unrecorded deed, it not appearing that such loss will endanger the complainant's defence.⁵ So, in suits by creditors, a receiver was appointed of certain property of the debtor. The debtor afterwards made an assignment for creditors, and the assignee claimed the property. Held, the dispute, whether the receiver or the assignee should have the property, was a pure question of law, not free from difficulty, and of the construction of the statute, and a judgment in a suit brought by either would be conclusive in a suit by the other; and therefore the assignee could not maintain a bill to restrain the receiver from prosecuting an action against him for the property. Though all the parties submitted to the jurisdiction, the bill was not retained.⁶

§ 11. Equity will not by injunction enable a party to try in equity a case the defendant has begun to try, and which can and should most properly be tried at law.⁷

¹ Smith v. Ryan, 20 Tex. 661.

² Spring v. Strauss, 3 Bosw. 607.

³ Smith v. Sparrow, 13 Cal. 596.

See McGregor v. Axe, 10 Ind. 362;
Maxwell v. Mullis, 12 Ind. 99.

⁴ Black v. Stone, 33 Ala. 327.

⁵ Rogers v. Cross, 3 Chand. 34.

⁶ Newkirk v. Morris, 1 Beasl. 62.

⁷ Reeves v. Cooper, 1 Beasl. 223,
498.

§ 12. Where a debt is justly due, proceedings under the (New Jersey) act of 1855 are not to be restrained, on the ground that the statute is unconstitutional or has been repealed, or that the attachment was not properly executed by the sheriff, or that the property is not liable to attachment; as the complainant cannot ask the aid of equity to escape payment of his just debts, and the questions should be tried in a court of law.¹

§ 13. In New York, a defendant who has an equitable defence, being authorized under the present rules of practice to interpose it by answer, is bound to do so, and cannot bring a separate action, merely to restrain another action pending in the same court.² Nor can one court enjoin a suit in another court of the State, having equal power to grant the relief sought by the complaint. No injunction can be had against a *mandamus*, inasmuch as the same court may stay the process, by which it was issued.³ So an injunction will not be granted against the process of *forcible entry and detainer*, unless in case of fraud, accident, surprise, &c.⁴ So (in Maryland) chancery will not grant an injunction to prevent the execution of a writ of *replevin*.⁵ So the (Cal.) district court, to which all actions pending in the Superior Court were transferred by the statute abolishing the latter, can arrest, on motion, all void processes issued by the latter; therefore, equity has no jurisdiction to arrest them.⁶

§ 13 a. An action will not be enjoined upon the ground covered by an equitable plea to the action, if the party can have the same relief at law. But if not, an injunction may be had, subject to any equitable order as to the costs of the plea.⁷

§ 14. The limitations to the rule, that an injunction will not lie to restrain a suit at law, where the plaintiff in equity has a good legal defence to such suit, are well illustrated in a late

¹ *Reeves v. Cooper*, 1 Beasl. 223, 498.

² *Winfield v. Bacon*, 24 Barb. 154.

³ *Weber v. Zimmerman*, 23 Md. 56.

⁴ *Lamb v. Drew*, 20 Iowa, 15.

⁵ *Glenn v. Fowler*, 8 Gill & John. 340.

⁶ *Chipman v. Bowman*, 14 Cal. 157.

⁷ *Waterlow v. Bacon*, Law Rep. (Eng.) Eq., August, 1866, p. 513.

case in Connecticut. In an application for injunction against a suit at law, founded upon an alleged discharge or satisfaction of the claim sued on, the court remarked as follows: "Even if this settlement was not founded on a good pecuniary consideration, as it certainly is, it might be received as a family settlement, and as such it should be sustained and upheld in a court of equity, and viewed in that character; if one part of it is good, every other part is equally so, as there is the same general consideration for the whole. But it is said that if we hold that the petitioner is released from the debt, there is a good defence of the action at law, and for that reason a court of equity should not interfere by injunction. This may possibly be so. A plea could perhaps be so framed in that action, as to present this discharge as a sufficient answer to the plaintiff's declaration; still the writing is not a technical discharge, and we think that the remedy is not so clear, certain, and adequate, as that, in the exercise of a sound discretion, we ought on that account to dismiss the bill, and hand the case over for further investigation elsewhere; nor would such a course be of the least benefit to the respondents. The effect of the writing is a question of law and not of fact, and a trial by jury or in a court of law, would not enable the administrators to escape the legal construction which the court in any case will give it."¹

§ 14 a. An action for damages may be enjoined, where the defence is an agreement for performance of certain acts, which cannot be enforced at law. Thus a bill was founded upon the allegations, that the plaintiff was about to raise the party-wall between his own premises and those of the defendant to a considerable height, which might darken the defendant's sky-light, and the parties agreed that the plaintiff might thus raise the wall, but he should not call on the defendant to contribute to the cost of rebuilding it under the Metropolitan Building Act, and, if it darkened the sky-light, should give the defendant new and better sky-lights. The defendant denied this agreement. It was held, that, although the plaintiff had set up these facts in defence to an action at law, he was still

¹ Per Ellsworth, J., *Hurlbut v. Phelps*, 30 Conn. 50.

entitled to a bill for specific performance and an injunction, inasmuch as a court of law could not compel the plaintiff to supply new and better sky-lights. The injunction was granted, the plaintiff undertaking to give judgment on the action, not to be entered up without leave of court; to submit to any order as to costs, and the construction of new sky-lights.¹

§ 15. Equity will restrain by injunction, not only the suit at law itself, but also the introduction of evidence in such suit, which, though perhaps legally admissible, is manifestly contrary to right and justice. Thus, where the defendants took land of the complainant under a charter, and the appraisers, in his absence, being misled as to some material facts, appraised the damage at one dollar when it really amounted to five thousand dollars; held, equity would enjoin the use of the appraisers' record by the defendants in an action at law for the damages. The formal regularity of the proceedings was held no objection to this interposition, but rather an additional ground, as depriving the party of any remedy at law. Held, also, that a new appraisal should be made under the direction of the court, and the injunction should stand until the damages thus awarded were paid.² So, although payment discharges a bond or judgment at law; equity may enjoin a party from setting up such payment.³ So the plaintiff gave a warranty deed of lands upon which, with the knowledge of the grantee, the defendant, a railroad had acquired a permanent easement, for their track, and for gravel, &c. The parties agreed to divide the damages, which the company should pay, in certain proportions, and that the defendant should make no claim on his covenants. He having commenced an action upon the covenants, the plaintiff brings a bill for injunction. Held, the defendant should be enjoined not only from prosecuting the suit, but also from using that deed and its covenants, as evidence for the purpose of enforcing such claim.⁴

¹ *Waterlow v. Bacon*, Law Rep. (Eng.) Eq., August, 1866, p. 513.

² *Wells v. Bridgeport, &c.*, 31 Conn. 316.

³ *M'Cormick v. Irwin*, 35 Penn. 111.

⁴ *Taylor v. Gilman*, 25 Vt. 411.

§ 16. Equity will sometimes *aid* as well as restrain a suit at law by injunction. (a) Thus an injunction will be granted to restrain the assignor of an equitable claim from dismissing a suit for such claim, brought in his name by the assignee.¹ So where suits had been brought before a magistrate against the drawers of prizes in a lottery, for the purpose of a forfeiture to the State under the statute, held, the district courts might enjoin the owner of the lottery from disposing of such prizes until the suits should be decided.² So, in case of necessity, the court will interfere to prevent the defendant from affecting property in litigation by contracts, conveyances, or other acts; or order security therefor.³ (b) Thus A sued B and C, in trespass, for malicious injury to his property. He then filed a bill in equity, alleging the facts of the trespass, and that B and C were engaged in it, and that they were disposing of their property to avoid its being taken to satisfy his judgment. He also prayed for a discovery. Held, the ancillary jurisdiction of a court of equity was properly invoked, though the defendants need not answer anything tending to criminate them.⁴ And an injunction *pendente lite* prevents *incumbrances* as well as *alienation*.⁵ But it is sometimes held, that the court has no jurisdiction to restrain the defendant in a suit at law from alienating his property, for the purpose of defeating the impending judgment.⁶ (c) Nor to compel parties to hold goods, pending a trial at law, to satisfy

¹ Deaver v. Eller, 7 Ired. Eq. 24.

² People v. Kent, 6 Cal. 89.

³ Shrewsbury, &c. v. Same, 4 Eng. L. & Eq. 171; 8 Rich. 349; Miller v. Washburn, 3 Ired. Ch. 161.

⁴ Cottrell v. Moody, 12 B. Mon. 500.

⁵ Vanyant v. Vanyant, 23 Ill. 536.

⁶ Moran v. Dawes, Hopk. 365.

(a) In Texas, writs of injunction, *ancillary* to a suit pending, are returnable only to the county where such suit is pending. Allen v. Menard, 5 Tex. 378.

(b) A special injunction, ordering security for the forthcoming of property in litigation, is within the powers of the Court of Equity, and in South Carolina may be granted by a master or commissioner, under the 8th section of the act of 1840. Aldrich v. Kirkland, 8 Rich. 349.

(c) Nor will an injunction be granted to protect property during litigation, if the complaint shows that the party has no title or interest in the property, and no claim to the ultimate relief sought by such litigation. State v. M'Glynn, 20 Cal. 233. Thus, where an information and subsequent complaint were filed in the (California) district court to set aside a probate decree in favor of a will; held, as the court had no jurisdiction for this purpose, it could not grant an injunction to protect the property during the litigation. Ib.

a possible judgment.¹ So it is doubted, whether equity will by injunction restrain the defendant, in an action of trover, from disposing of the property, pending the suit.²

§ 17. An injunction will not be granted in aid of an illegal proceeding at law.³ Nor to protect a legal right which may be tried at law, unless under special circumstances.⁴

§ 18. An injunction upon a bill of discovery in aid of an action at law may be dissolved, though the complainant has excepted to the answer for impertinence merely, where the bill has been fully answered.⁵

§ 19. In reference to the *parties* in cases of this nature ; it is held that *the government* cannot be sued, except by its own consent, given by statute ; and, consequently, an injunction to stay proceedings at law cannot be allowed against the United States.⁶

§ 20. The State of Connecticut having commenced several ejectments, the State of New York brought a bill, alleging title to the soil and jurisdiction of the land in dispute, and prayed a discovery, relief, and an injunction. Held, as New York was not a party to the suits below, nor interested in those decisions, an injunction should not be granted. And as the State of Connecticut did not appear, and a *subpœna* had not been served sixty days before the return day, as required in suits in equity, the complainant should not be at liberty to proceed *ex parte* on the first day of the ensuing term, if the State did not appear, but an *alias subpœna* should be awarded.⁷

§ 21. Separate purchasers of different parcels of the same lot of land cannot join in a bill against the former owner, to

¹ Phelps v. Foster, 18 Ill. 309.

² Robertson v. Bingley, 1 McC. Ch. 333.

³ Haight v. Bergh, 2 Green, Ch. 386.

⁴ Wooden v. Wooden, 2 Green, Ch. 429.

⁵ Jewett v. Belden, 11 Paige, 618.

⁶ Hill v. The United States, 9 How. 386.

⁷ New York v. Connecticut, 4 Dal. 3.

enjoin the prosecution of separate ejectment suits commenced by him against them.¹

§ 22. Where a creditor held several securities for a debt, the court refused to enjoin him from proceeding to enforce one of them, in order that the debtors might have opportunity to settle among themselves a question of priority as to their liabilities.²

§ 23. Where a creditor, on receiving a judgment bond, agreed to collect the debt secured by it, ratably, against the obligors and others, he was enjoined from proceeding to collect the debt of the obligors in the bond only.³

§ 24. With regard to the *terms* on which a suit at law will be enjoined ; it is the prevailing rule, that where a defendant at law, before judgment, files his bill for relief on equitable grounds, and for an injunction, the injunction should be granted only on condition that he confess or agree to confess judgment, though he may have grounds of defence at law distinct from his equitable defence.⁴ In such case, where the injunction is dissolved because the complainant refused to confess judgment, and there is an appeal, the appellate court will not examine the merits of the case, though at the time the order was made the cause stood for hearing.⁵ So on a bill filed by a defendant at law, on the ground that the subject is a trust, and proper for equitable cognizance, an injunction ought not to be granted, staying the trial at law, but only execution on the judgment which may be recovered.⁶ So where a defendant at law transfers the case to a court of equity, upon an allegation that his defence is equitable, the plaintiff at law should be allowed to proceed to judgment, that there may be no delay of execution, if the defendant does not succeed in his defence.⁷ So it is held, that a party applying for an injunction, to stay proceedings at law upon a

¹ Wood v. Perry, 1 Barb. 114.

Ired. Ch. 178. *Contra*, Lawrence v.

² Goodwin v. State Bank, 4 Desau. 389.

Bowman, 1 McAll. C. C. (Cal.) 419.

⁵ 1 Leigh, 96.

³ Briggs v. Low, 4 John. 22.

⁶ Justice v. Scott, 4 Ired. Eq. 108.

⁴ Warwick v. Norwall, 1 Leigh, 96 ;
Matthews v. Douglass, Cooke, 136 ; 3

⁷ Anderson v. Walton, 1 Freem. Ch. 347.

money bond, must be bound, by order, to bring no writ of error.¹ Upon this ground, in New York, a bill for an injunction to stay a suit at law must state whether issue has been joined; for, if it has, a provision must be inserted in the injunction, allowing the suit to proceed to judgment; and if not, the master has no authority to issue an injunction, without the security required by statute.² So the complainant must show in his bill the state of the pleadings, and the court in which the suit is pending, in order to enable the officer, to whom the application is made for the injunction, to judge of the propriety of its allowance, and to prescribe the terms.³

§ 25. The terms of granting an injunction in this class of cases often depend upon the statutory law. Thus it is held, that the statute of Michigan (R. S. 374, § 91) is peremptory, that no injunction shall be granted to restrain proceedings at law, when a cause is at issue, without filing a bond in such sum as the officer allowing the injunction shall prescribe.⁴ So, in Indiana, upon a bill for discovery in aid of a defence to an action at law, also praying a stay of proceedings till such discovery; held, the latter prayer should not be granted, without a statutory bond.⁵

§ 26. Injunction is often connected with *discovery*, another important and leading head of equity jurisdiction. In New York, an injunction master cannot stay proceedings in a suit, in which issue has not been joined, except in case of a mere bill of discovery in aid of the defence, or where the only relief prayed is merely in aid of the defence.⁶ The master, if no issue has been joined, should direct a provision in the injunction, permitting the party to proceed to judgment, unless the bill was for a discovery merely.⁷ In the same State it is held, that, upon a bill of discovery in aid of a suit at law, an *ex parte* injunction to prevent the defendant from proceeding to trial should not be granted, where no fact is positively sworn to as being within the knowledge of the defendant,

¹ 3 Ired. Ch. 178.

² Teller v. Van Deusen, 3 Paige, 33.

³ Carroll v. Farmers, &c., Harring. Ch. 197.

⁴ Ib.

⁵ Lemon v. Morehead, 8 Blackf. 561.

⁶ Melick v. Drake, 6 Paige, 470.

⁷ Jenkins v. Wilde, 2 Paige, 394.

which, if proved, would defeat the defence, and enable the plaintiff to recover.¹

§ 27. Where the defendant, in an action of trover, filed a bill for a discovery and an injunction, but failed to obtain a discovery, the court refused to grant the injunction, and dismissed the bill.² So, where a bill is filed to restrain a suit at law, on the ground that the complainant has a legal defence, but that it cannot be established without the evidence of the defendants to the bill; this is a bill of discovery merely, and, on the coming in of the answer, denying the equity of the bill, it should be dismissed on dissolving the injunction.³

§ 28. When an action at law is brought on a penal bond, conditioned for the payment of money on performance of a condition precedent, and the defendant files a bill to obtain a discovery as to the execution of the trust which constituted the condition; if the answer of the obligee discloses that the trust has not been fully executed, the court may enjoin the action at law, without compelling the obligor to account for the benefit received from the partial performance.⁴

§ 29. A very important point of inquiry, in reference to the injunction of suits at law, arises from the conflicting authority of the State or the tribunal, with which the Court of Equity, whose aid is invoked, is called upon to interfere. Upon this subject, in a late English case, it is said, "Even though no decree has been obtained in this country, yet if a suit instituted abroad appears ill calculated to answer the ends of justice, the Court of Chancery has restrained the foreign action, imposing, however, terms which it has considered reasonable for protecting the party who was suing abroad."⁵ "Where, pending a litigation here, in which complete relief may be had, a party to the suit institutes proceedings abroad, the Court of Chancery in general considers that act as a vexatious harassing

¹ *Burgess v. Smith*, 2 Barb. Ch. 276.

² *Brown v. Dickinson*, 10 Rich. Eq. 408.

³ *Steele v. Lowry*, 6 Ala. 124.

⁴ *Rives v. Toulmin*, 25 Ala. 452.

⁵ Per Lord Cranworth, *The Carron, &c. v. Maclaren*, 35 Eng. Law & Eq. 50; *Cotesworth v. Stevens*, 4 Hare (30 Eng. Cha.), 185.

of the opposite party, and restrains the foreign proceedings.”¹ So the court in Massachusetts, in a very recent case, remarks as follows: “The authority of this court, as a court of chancery, upon a proper case being made, to restrain persons within its jurisdiction from prosecuting suits either in the courts of this State and of other States, or foreign countries, is clear and indisputable. In the exercise of this power, courts of equity proceed, not upon any claim of right to interfere with or control the course of proceedings in other tribunals; but the jurisdiction is founded on the clear authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process, to restrain them from doing acts which will work wrong and injury to others. As the decree of the court in such cases is pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party is prosecuting his action in the courts of a foreign State or country.”² (a)

§ 30. In the case with reference to which these remarks were made, a citizen of Massachusetts attached in Pennsylvania personal property of an insolvent debtor residing in Massachusetts. Held, the assignees of such debtor, under the insolvent laws of Massachusetts, might maintain a bill for an

¹ Per Lord Cranworth, *The Carron, &c. v. Maclaren*, 35 Eng. Law & Eq. 49. ² Per Bigelow, C. J., *Dehon v. Foster*, 4 Allen, 550.

(a) So it is said by the court in New Hampshire: “It would be a great defect in the administration of the law, if the mere fact, that the property was out of the State, could deprive the court of the power to act. As much injustice may be perpetrated in a given case, against the citizens of this State, by going out of the jurisdiction and committing a wrong, as by staying here and doing it. As the Legislature has conferred upon the court the power to issue injunctions whenever it is necessary to prevent injustice, it is the duty of the court to exercise that power upon the presentation of a proper case, and when it can be done consistently with the acknowledged practice in courts of equity. As the principle which is sought to be applied here, has been recognized for nearly two hundred years, we have no hesitation in holding that the court has jurisdiction.” Per Gilchrist, C. J., *Great Falls, &c. v. Worster*, 3 Fost. 470. See *Penn v. Baltimore*, 1 Ves. 444; *Arglasse v. Muschamp*, 1 Vern. 75; *Toller v. Carteret*, 2 Vern. 494; *Cranstown v. Johnson*, 3 Ves. 170; *Portarlington v. Soulby*, 3 M. & K. 104; *Massie v. Watts*, 6 Cranch, 148; *Mitchell v. Bunch*, 2 Paige, 606; *Mead v. Merritt*, *Ib.*, 404; *Hawley v. James*, 7 Paige, 213.

injunction, though the suit was commenced before the institution of insolvency proceedings, more especially if done with notice that they were about to be instituted, and in order to obtain a preference.¹ (a)

§ 31. Some of the leading cases, which fully justify these views, are as follows : —

§ 32. In *Portarlington v. Soulby*,² Lord Brougham restrained the indorsee of a bill from suing the plaintiff in the Irish courts on such bill, upon certain equitable grounds which would have warranted a similar injunction against any action in the English courts. So where a decree had been obtained for the execution of the trusts of a deed for the benefit of creditors, and a receiver of real estates in England and Ireland appointed, and some of the trustees afterwards filed a bill in Ireland for executing the trusts ; Lord Eldon restrained them from prosecuting that suit, on the ground that it sought the same relief as might be had under the decree obtained in England. But his lordship said that he would not prevent them from filing a bill in Ireland for the mere purpose of calling on the receiver there to account for his receipts and payments, without making it a general suit for administering the trusts of the deed.³ So, after a decree in England for an account on a bill to redeem a West India mortgage, Sir John Leach would not suffer the mortgagee to prosecute a suit in Jamaica for foreclosing the same mortgage, on the ground that full relief might be obtained under the decree in England.⁴ So where a bill was filed by the obligor in a bond, against the obligee and a person claiming under him by assignment, to have the bond delivered up and cancelled ; the court would not permit the assignee, who was a Scotchman and had real estates in

¹ *Dehon v. Foster*, 4 Allen, 545 ; 7 Ib. 57.

² *Harrison v. Gurney*, 2 Jac. & W. 563.

³ 3 My. & K. 104.

⁴ *Beckford v. Kemble*, 1 Sim. & St. 7.

(a) It was intimated that the decision might be different if it appeared that there were foreign creditors, who would by the injunction of the suit acquire a preference. With regard to *costs*, it was ordered that the defendant should be indemnified for the costs of his action, up to notice of the bill in equity ; and the plaintiff have his costs in equity after the filing of the bill. *Dehon v. Foster*, 7 Allen, 57.

Scotland, to prosecute an action on the bond, which action he had raised in the Court of Sessions, even though the Scotch proceedings had been commenced two months before the bill to restrain them was filed. The bond was alleged to have been given in England for a gaming debt, as was known to the assignee, and the question to be decided in any form was, whether by the law of England the assignee was entitled to recover. Sir John Leach thought, first, that this question could be better decided in England, where the courts judicially know the law, than in Scotland, where the courts could only know the law as a matter of fact, to be communicated as evidence; and, secondly, that the remedy in England, if the obligor should make out his title to relief, would be more complete than could be had in Scotland. He therefore restrained the defendant, the assignee, from going on with the Scotch action, putting the plaintiff on terms as to giving a judgment for security to the holder of the bond.¹

§ 33. In another recent case, a distributee in Mississippi procured the administrator's accounts to be settled in the Probate Court in that State, and a large balance was found due thereon. He then sued the surety on the bond, and persuaded him to make no defence, by telling him that he should not be molested, but that the judgment was wanted only to bring the administrator to a settlement. The surety gave his note for the judgment, and, not procuring a settlement with his principals, obtained an injunction in Tennessee to stay suit on the note, notwithstanding which, the payee sued the note in the Circuit Court. Pending that suit, the probate decree in Mississippi was reversed, on appeal, and a very small balance decreed to be due. Thereupon the maker applied for an injunction in the Circuit Court in that State to stay the suit on the note. Meantime the Tennessee court, upon sufficient evidence, had decreed that the payee should cease his suit upon payment of a small balance. Held, thereupon, that the injunction should issue from the Circuit Court in Mississippi.²

§ 34. But it will not be the duty of the court to restrain

¹ *Bushby v. Munday*, 5 Madd. 297.

² *Cage v. Cassidy*, 23 How. U. S. 109.

foreign proceedings, if substantial justice is likely to be promoted by allowing them to take their course. Thus, where the plaintiff, who was heir of *tailzie* under a Scotch settlement, filed a bill to have his estate exonerated from an heritable bond by means of the personal estate; Sir John Leach declined to restrain proceedings in Scotland, where the question as to the right claimed would be more conveniently discussed; and ordered the cause in England to stand over, till the result of the Scotch proceedings should have been determined.¹ And in a late case in Vermont it is held, that a suit in one State will be enjoined to parties in another, only when the ends of justice, and not the mere convenience of parties, require it.² So, in late cases in England, from one of which the remarks of the court have been already cited, the general propositions were laid down, that, where it would be the duty of one domestic court to restrain a party from instituting proceedings in another, it may also restrain proceedings in a foreign court. Also, that, where there is a plain equity in favor of an injunction, and the representatives of the real and personal property, who seek it, are in this country, the court will grant it, and restrain proceedings in the courts of a foreign country. In such a case, the court will decide upon a consideration of all the circumstances, and require parties here to take or omit such steps in a foreign court as the ends of justice may require. The particular provisions of the foreign law, applicable to a transaction, proceedings as to which in a foreign court are thus restrained, must not be disregarded. But still, under the circumstances of the case, an injunction was refused. The facts of this case, as successively reported, were as follows: A company was chartered in Scotland for the manufacture of iron. Its manufactory and chief office of management were there; it had agents for the sale of the goods in different parts of Scotland and England; and possessed real estate in both countries. A, a large shareholder in the company, and possessed of real and personal property in England and Scotland, was the company's agent for the sale of goods, and was domiciled in London. When he died, he made a will in the English form, and appointed as his executors persons who were

¹ *Elliott v. Minto*, 6 Madd. 16.

² *Bank, &c. v. Rutland*, 2 Wms. 470.

resident in both countries; his heir was one of these persons, and was also the person who succeeded him in the London agency for the company. Probate of the will was taken out in England, and such of the executors as thought fit to apply to the Scotch court were according to the Scotch law confirmed in the execution of the will. An administration suit was instituted in the Court of Chancery, and the usual order for a general account of the debts and assets made. After the date of this order, the iron company took proceedings in the Scotch courts against the real and personal estate of the testator in Scotland. Notice of an injunction, at the suit of the executors, was served on the company's agent in London, and on the company's manager in Scotland; the company did not appear and the injunction was issued. The company then moved to dissolve the injunction. No order was made. Held (Lord St. Leonards dissenting), that the injunction should not be maintained. In another case, growing out of the same transactions, a bill was brought by the executors and trustees of A, who had large estates, both real and personal, in England and in Scotland, for the administration of his estate, in which there was the ordinary decree. Suit in Scotland by a Scotch company, whose agent in London A had been, claiming a large balance on the accounts between them and A. The Master of the Rolls, on motion by the plaintiffs, restrained the Scotch company from proceeding in this suit; but on appeal to the House of Lords that order was reversed, Lord St. Leonards dissenting. A second bill was then filed in England against the Scotch company, for discovery of the dealings and transactions between the company and the testator. There was conflicting evidence as to whether it would be more convenient to take the accounts in England or in Scotland. Motion in both suits to restrain the Scotch company from proceeding in their suit refused with costs.¹ In this case, heard in the House of Lords, the whole subject of restraining foreign suits by injunction is fully gone into, and elaborate and learned opinions are delivered by Lords Cranworth, Brougham, and St. Leonards.

¹ *Maclaren v. Stanton*, 35 Eng. Law & Eq. 384; *Carron v. Maclaren*, 35 Eng. Law & Eq. 37.

§ 35. It was held, that, where there has been a final decree in a suit in India, upon motion by the defendant in a similar suit in England, between the same parties and for the same purpose, the court in England will make an order staying all proceedings in the English suit, without prejudice to any proceedings which the plaintiff may be advised to adopt with reference to the decree and proceedings in India. That an administrator *de bonis non*, &c., in India, appointed by the authority of the plaintiff, administrator in England, is substantially the same party for this purpose. That such administrator in India is authorized to assent to a compromise, under the authority of the court in India, and a decree adopting that compromise is a final decree. And that, after such decree, the plaintiff in England cannot, by supplemental bill or amendment under the new practice, continue the English suit, in order to obtain discovery of facts which would enable him to set aside the decree in India.¹ But in the same case it was subsequently decided, that before equity interposes, upon an interlocutory application, to stay proceedings in a suit, by reason of a decree or judgment in a foreign country, it must be satisfied that the foreign decree or judgment does justice, and covers the whole subject of the suit.²

§ 36. In reference to the right of one court to restrain proceedings in another, and the question of conflicting jurisdiction; in a late English case, brewing utensils, hops, &c., having been seized under execution from a county court against the goods of A, were claimed by B. On the 5th of October, the bailiff caused an interpleader summons to be issued, calling on the parties to appear on the 18th, when the claim would be adjudicated upon. The county court judge decided that the goods were the property of B. The goods having been given up, B commenced an action against the execution creditor for damages, for wrongfully depriving him of the possession of the goods, by means whereof he was prevented from carrying on his trade as a brewer, alleging special damage. The court refused to interfere to stay the proceedings

¹ *Ostell v. Lepage*, 17 Eng. Law & Eq. 57. ² *Ib.*, 21 Eng. Law & Eq. 640.

at the instance of the defendant. It seems that, if the proceedings on the interpleader summons constituted a defence to the action, it should have been pleaded.¹

§ 37. In England, a court of common law cannot grant an injunction in an action of ejectment, under § 82 of the common law procedure act, 1854, 17 and 18 Vict. c. 125.²

§ 38. A court of equity will not enjoin a suitor in that court from moving for relief in the same court.³ And the court will not enjoin its own proceedings, though it may suspend its own order.⁴

§ 39. Where executors applied for leave to amend a bill filed by their testators, and for an injunction against suits begun in the United States Circuit Court, or to reinstate an injunction against suits in a State court, which had been dissolved ; held, the bill could be amended by adding new matter, without excuse for its being originally omitted, and notwithstanding the denial of the matter proposed to be added by affidavits. The injunction against the suits in the Circuit Court was denied, and the petitioners left to apply there for a stay of proceedings, until the matter of equitable relief was finally heard in the State court. The other injunction was refused by the vice-chancellor, as the case had been appealed, and the chancellor had control of the appellate proceedings.⁵

§ 40. Where the defendant in an ejectment suit, brought on the law side of the Circuit Court of the United States, by one claiming under a patent of the United States, filed a bill on the equity side of the court, for an injunction upon the plaintiff in ejectment, alleging that the patent was fraudulently obtained, and on the hearing no fraud was proved ; held, the

¹ Jones v. Williams, 4 Hurl. & Nor. 706.

² Baylis v. Legros, 40 Eng. Law & Eq. 272.

³ McReynolds v. Harshaw, 2 Ired. Ch. 195.

⁴ Medlock v. Cogburn, 1 Rich. Ch. 477.

⁵ Coster v. Griswold, 4 Edw. Ch. 364.

bill must be dismissed, and the merits of the case left to be settled in the trial at law.¹ (a)

§ 41. Equity often interferes with suits at law by injunction, for the purpose of preventing or stopping *useless or vexatious litigation*.² Thus in a recent case it was held, that, where land has been laid out in town lots, or otherwise divided among many occupants, who are threatened with numerous suits, a bill in equity lies to quiet the title, and enjoin a suit at law for a particular fractional part, although the complainants have a legal title, and therefore an adequate remedy at law in each particular case. The object of such bill is to relieve the title from the embarrassment of the adverse claims, and also to restrain a multiplicity of suits.³ So on a bill for injunction against a fifth ejectment, threatened by the defendant after two dismissals and two judgments for the complainant, one of which was affirmed in the appellate court, the bill should be sustained, and an answer directed, according to the rules of equity.⁴ And injunction is a suitable process, to prevent a party who has commenced proceedings in one court from proceeding in the same matter in another; more especially where the former court has made a decision against him.⁵ So a

¹ *Gaines v. Nicholson*, 9 How. 356.

⁴ *Dedman v. Chiles*, 3 Monr. 426.

² *Woodruff v. Fisher*, 17 Barb. 224.

⁵ *Conover v. Mayor, &c.*, 25 Barb.

³ *Crews v. Burcham*, 1 Black, 352.

513.

See *Woodruff v. Fisher*, 17 Barb. 224.

(a) The practice, in reference to the particular court with whose proceedings equity will interfere by injunction, depends in this country, to some extent, upon local usage. It is held that the Court of Chancery of New York will not grant an injunction to stay the proceedings in a suit commenced in a court of competent jurisdiction in another State, except in a very special case. *Burgess v. Smith*, 2 Barb. Ch. 276. And by a later case the rule seems to be established without any exception. *Williams v. Ayrault*, 31 Barb. 364. The court will not grant an injunction to stay proceedings in a court having the same power to grant relief. *Grant v. Quick*, 5 Sandf. 612. In Tennessee, suits in courts of law, on notes executed for the purchase-money of estates sold at a chancery sale, are improper, and may be enjoined, but not in any other court than that in which the original chancery suit is pending. *Deaderick v. Smith*, 6 Humph. 138. The Supreme Court cannot issue an injunction to restrain proceedings in a cause in the Circuit Court. *Barry v. Green*, 5 Hey. 67. Where A and B both claim a fund in the hands of C, as stake-holder, and A files a bill in equity against C without making B a party; B may by interpleader bill restrain such former suit. *Prudential, &c. v. Thomas*, Law Rep. (Eng.) Eq., January, 1868, p. 74.

court of chancery may compel a party, who is prosecuting two suits for the same thing, to abandon one or the other, and select in which tribunal he will continue to prosecute. But this rule only applies, where a recovery in one would be a bar to a judgment or decree in the other.¹ So equity will enjoin suits which are in substance if not literally violations of a former order. Thus a perpetual injunction was granted, restraining the defendant from interfering with the navigation of the plaintiffs' canal. He afterwards brought fifteen actions against the plaintiffs for the passage of that number of barges over the land claimed by him. Held, a violation of the spirit of the former decree, and the actions were enjoined.² And a bill in equity, to enjoin several lawsuits, will be retained, to settle the whole controversy, especially where the legal rights of the parties have already been settled by a decree in the suit.³

§ 42. But where the ground, on which a party seeks relief in the court against the operation of a city ordinance, would be equally valid as a defence to a suit at law for a breach of such ordinance, the court will not grant an injunction to prevent a multiplicity of suits for such breaches, until the invalidity of the ordinance has been settled in a suit at law.⁴ So a bill to enjoin proceedings in some, out of a large number of actions of ejectment, and to permit the plaintiffs at law to proceed in as many as might be deemed necessary to try the title to the lands in question, the parties, title, and testimony being the same in each suit, was dismissed, on the grounds that the relief sought, if proper at all, could be afforded as well at law as in equity, and that the application was premature, before several verdicts had been rendered.⁵ So where A, pending a suit at law in the Supreme Court against B, for obstruction of a watercourse, commenced a new suit before a justice of the peace, every week, for the continuance of the obstruction; it was held that B, not having established his title at law, was not entitled, on a bill of peace, to an injunction upon A to

¹ *Laraussini v. Carquette*, 24 Miss. 151.

² *Dwelle v. Roath*, 29 Geo. 733.

³ *The Grand, &c. v. Dimes*, 17 Sim. 38.

⁴ *West v. Mayor, &c.*, 10 Paige,

539.

⁵ *Peters v. Provost*, 1 Paine, 64.

prevent litigation.¹ So, in a case of two creditor's bills, the first alleged that the defendant—the widow and personal representative of the debtor—had carried on his trade, and prayed for an account of the profits. The second prayed only for the common relief, and a decree was rendered in the second. Held, the first suit had an advantage over the second, and should not be enjoined.² And, in general, in order to entitle a party to maintain a bill of peace to restrain ejectment on the ground of preventing vexatious litigation; it must appear that the title has been fully and satisfactorily established at law; it is not enough that suits have been instituted and abandoned before trial.³

§ 43. The interference of the court in this mode may sometimes be affected by the question of *amount*. A writ for more than is due will be enjoined.⁴ But the court refused to stay by injunction an action to recover certain instalments due for work, in order that the amount might be ascertained by a reference, or issue of *quantum damnificatus*; the amount of the instalments sued for appearing, by the answer, not to exceed an adequate compensation for the materials found and work done.⁵

§ 43 a. On a bill by one in possession of land, for the specific performance of an alleged agreement by the defendant to purchase the land at sheriff's sale, on execution against the complainant, and take a mortgage for the amount advanced by him to pay incumbrances; an injunction to stay proceedings to recover possession from the complainant will not be retained until the hearing, if the amount due is large in proportion to the value of the land, and the responsibility of the complainant is comparatively limited.⁶

§ 43 b. The question of *set-off* or discount often arises in this class of cases. Thus an action on a forthcoming bond was enjoined at the instance of the surety therein, on the

¹ Eldridge v. Hill, 2 John. Ch. 281.

² Underwood v. Jee, 17 Sim. 119.

³ Patterson v. McCamant, 28 Mis. 526.
210.

⁴ Harper v. Terry, 16 La. An. 216.

⁵ Skinner v. Dayton, 2 John. Ch.

⁶ Clark v. Wood, 2 Halst. Ch. 458.

ground that he had a debt of larger amount against the plaintiff, and that the latter was insolvent.¹ So where covenants, in form independent, are in fact part of the same transaction, and mutual, equity will restrain the collection of one, upon the failure of the other.² So the insolvency of the vendor of a diseased slave is sufficient ground to enjoin the payment of a note of a third party, assigned by the vendee to the vendor, the note being at the time unpaid.³ But where a lessee, entitled to away-going crops, was evicted by a prior mortgagee, during the term, and while the crops remained upon the land; the court refused to stay a suit for the rent, to enable the lessee to offset the damages for the loss of his crop, the allegations in the bill, that the plaintiff was out of the jurisdiction, and insolvent, being fully denied in the answer.⁴ So an action of trespass will not be enjoined, upon the ground that the plaintiff is, and was at the time of the alleged trespass, indebted to the defendant, and is insolvent.⁵

§ 44. The following remarks of Lord Loughborough, though immediately applicable to the equitable remedy of *interpleader*, have a bearing upon the subject of injunction: "A party claiming no right in the subject, is doubly vexed by having two legal processes in the names of different persons going on against him at the same time. He comes upon the most obvious equity to insist, that those persons claiming that to which he makes no claim, should settle that contest among themselves, and not with him. It may be said in all cases of *interpleader*—'stand the action.' If A proceeds first, and you have a good defence against him, that puts an end to his claim; if not, that is a defence against the claim of B. That is precisely the situation in which the plaintiffs ought not to be placed."⁶ And where one of the defendants to a bill of *interpleader* is suing the plaintiff in equity, and another at law, the court will enjoin both suits.⁷

¹ McClellan v. Kinnaird, 6 Gratt. 352.

² King v. Lindsay, 3 Ired. Ch. 77.

³ Brownston v. Cropper, 1 Litt. 173.

⁴ Tone v. Brace, 1 Clarke, 291.

⁵ Harrison v. M'Crary, 1 Ala. Sel. Cas. 619.

⁶ Langston v. Boylston, 2 Ves. Jr. 108.

⁷ Crawford v. Fisher, 10 Sim. 479.

§ 45. Suits relating to *real property* are perhaps more frequently than any others the subjects of applications for injunction, whether brought directly to recover the land itself, or growing out of incidental and collateral contracts and liabilities connected therewith.¹ (See Chap. XXVIII.) Where one has obtained a patent for land, with knowledge of a prior equitable title, of which the legal title is outstanding in a third person, and has brought a writ of right for the land; equity will stay the proceedings at law for a reasonable time, to afford the tenant an opportunity to get in the legal title.² So it is held that equity will restrain an ejectment against the owner of an entry, to give him an opportunity of obtaining a grant.³ So where one has a legal as well as an equitable title, equity will enjoin an ejectment brought against him by a party who, if successful in the action, would be a trustee for him.⁴ So a bill for an injunction lies to restrain an ejectment, and for other relief, where the original parties actually hold and possess as tenants in common, and the complainants have made valuable improvements.⁵ So a claimant, resting on an equitable title, depending on a deed and a bond for title, both lost, may go into equity and obtain an injunction to stop suits at law for the premises, and also obtain full relief.⁶

§ 46. An ejectment for land may sometimes be restrained upon the ground of *equitable estoppel* or *implied trust*. Thus the route of a raceway of an incorporated company was located over certain lots of A. The company appointed a committee to negotiate with the land-owners for the purchase of the land over which the route was located. B was president, and also an acting manager, of the company, and offered to negotiate for the committee the purchase of A's land for the company, and the committee thereupon intrusted the negotiation to B. B bought A's lots for fifty dollars a lot, and took a deed in his own name, the deed stating the amount paid as one hundred dollars per lot. The company offered B what he had paid for

¹ See *The State v. Murphy*, 8 Blackf. 493.

² *Goodwin v. McCluer*, 3 Gratt. 291.

³ *Hendrick v. Dallum, Cooke*, 220;

1 Overt. App. 489.

⁴ *Crofts v. Middleton*, 35 Eng. Law & Eq. 466.

⁵ *Jackson v. Jones*, 25 Geo. 93.

⁶ *Frith v. Roe*, 23 Geo. 139.

the lots, and went on and constructed their raceway over the land. B was perpetually enjoined from bringing ejectment to recover possession.¹ In the same case, B owned another lot over which the raceway was located and constructed, and was president and acting manager of the company at the time of such location and construction, and made no objection, but was active in the direction and proceedings of the company in locating and constructing the raceway on and over the lot. He was perpetually enjoined from bringing ejectment to recover possession. An issue was ordered to ascertain the value of the lots.² So a colliery proprietor constructed a railroad from the colliery across the lands of several other persons, by agreement, and his solicitor wrote a letter to the defendant, whose lands he wished to cross, in which he referred to an act of Parliament, as authorizing him to take lands, and offered to pay for the land at a fair valuation. Some time afterwards, the plaintiff and defendant met, but did not agree as to the price. The road having been made, three or four years afterwards, the defendant brings ejectment. Held, an injunction should be granted against the suit, upon the plaintiff's giving judgment therein, and paying into court a sum equal to the utmost valuation of the land.³

§ 47. The same remedy is sometimes applied, to relieve from the consequences of failure in *the strict performance of a condition or contract*. Thus A conveyed land to B, with condition that, if B should pay one hundred dollars to C, and certain other sums to certain other persons, in one year from the decease of A, the deed should be good and valid, otherwise null and void. On the 14th of February, 1841, A died; and within one year B paid the sums, except the one hundred dollars to C. On the 7th of March, 1842, B tendered that sum, with interest, to C, which C did not accept. On a bill in chancery, brought by B against C and the heirs at law of A, praying for a confirmation of B's title, and an injunction against the further prosecution of an action at law then pending, brought by D, one of the heirs at law of A, to recover

¹ *Trenton, &c. v. McKelway*, 4 Halst. Ch. 84. See p. 283.

² *Ib.*

³ *Powell v. Thomas*, 6 Hare, 300.

possession of the land; held, B was entitled to the relief sought.¹

§ 48. But it is held that a party, whose right to land has not been established at law, will not be protected by injunction against a suit to recover the land.² So where no final verdict in ejectment has been obtained by the complainant, equity cannot enjoin the bringing of an ejectment; and this objection may be taken after the filing of the answer, and even when the court is charging the jury.³ And equity will not enjoin such suit, on the ground of any claim arising under the statute of limitations, that being a matter peculiarly proper for the consideration of a court of law.⁴ So an injunction to restrain heirs from prosecuting an ejectment, to recover property of inheritance sold by a trustee, to whom their mother, who had a life estate in the premises, had conveyed it in trust for the use of her minor children, or an order to execute releases thereof, will not be granted, where there is no evidence of consent to, or consideration received for, the sale by them after their majority.⁵ So it is a rule of practice in the Circuit Court of the United States, not to allow an injunction to stay an ejectment, until it can be investigated in equity, unless judgment be entered therein.⁶ So (in England) the common law procedure act of 1854 does not authorize a writ of injunction in an action of ejectment.⁷ And where it is plain that the deed, under which the plaintiff in ejectment claims, is invalid in law, the defendants will be left to make their defence in the action, and cannot have it enjoined.⁸

§ 49. Where a note, given for the purchase-money of land, to which the payee has given bond to make title, has been assigned to a third party, and suit instituted upon it, and the payee is unable to make title to the land, the vendee is enti-

¹ *Bowen v. Bowen*, 20 Conn. 127.

² *Thompson v. Engle*, 3 Green, Ch. 271.

³ *Brown v. Redwyne*, 16 Geo. 67.

⁴ *Caldwell v. Williams*, 1 Bail. Ch. 175.

⁵ *Farley v. Woodburn*, 2 Stockt. 96.

⁶ *Turner v. American, &c.*, 5 McLean, 344.

⁷ *Baylis v. Le Gros*, 2 C. B. (N. S.) 316.

⁸ *Morris Canal, &c., Co. v. Dennis*, 1 Beasl. 249.

tled to relief in equity.¹ So where there is a defect in the title to land sold, and the solvency of the vendor is doubtful, the collection of the purchase-money will be restrained, until the purchaser is indemnified.² And, on the other hand, where a vendee of land had purchased a prior incumbrance, and had set up this new title in an action on the note for the purchase-money, brought by his vendor, as showing a total failure of consideration ; held, on a bill in equity for an injunction against such defence, the remedy in equity was more certain and complete than that at law, and the grantee was enjoined from setting up his new title as a defence beyond the amount which he had paid for it.³ But the mere claim by a third person of a paramount title, not alleged by the bill to be valid, and bringing suit upon that claim against the purchaser, are not sufficient to authorize a court of equity to stay, by injunction, the vendor who has warranted the title, from proceeding either at law or in equity to collect the unpaid purchase-money.⁴ So an injunction should not be granted to restrain a suit for the purchase-money of land, upon the ground that there were prior liens due, and that the complainant gave more for the land than he otherwise would have done, in consequence of misrepresentations made by the vendor or his agent at the time of the sale, unless the plaintiff sets forth in his bill, as nearly as he can, the amount of such liens, and what he believes to be the amount of the injury sustained. And where the purchaser is entitled to compensation merely, he cannot enjoin the vendor from collecting the purchase-money ; or, at most, he can only enjoin him for the sum which he alleges distinctly in his bill to be due to him for such compensation.⁵ So where a purchaser had remained ten years in the undisturbed enjoyment of the property, it was held to be no ground of injunction to stay proceedings for the recovery of the purchase-money, that the original purchase was void by the laws of the State, but that he had neglected to urge that defence at law ; or that he had heard that some persons unknown might possibly, at some future time, assert a title to

¹ *Black v. Bowman*, 4 Eng. 501.

² *Jones v. Stanton*, 11 Mis. 433.

³ *Champlin v. Dotson*, 13 S. & M.

553.

⁴ *Gayle v. Fattle*, 14 Md. 69.

⁵ *Ashe v. Hale*, 5 Ired. Eq. 55.

the property ; and such an injunction, if granted, must be dissolved.¹

§ 50. A sold land to a company of which B was a member, and took B's individual guaranty on bonds given for the purchase-money. At the same time A made an indenture with the purchasers, covenanting that the lands in five years would sell for a certain price, and pledged therefor his stock in the company. Shortly after the sale, A deposited the bonds, as collateral security for a loan to him, with the United States Bank. The bank sold the bonds to C and others. A became insolvent, the land depreciated greatly in value, and he was wholly unable to indemnify the purchasers. The holders of the bonds brought suits on them against B, who filed a bill for an injunction against the suits, and prayed also that the lands might be sold and the proceeds applied on the bonds. Held, that, while the bonds were in the hands of A, even before the expiration of the five years, B would have been entitled, on a well-founded apprehension of loss, to a bill, *quia timet*, for an injunction restraining A from selling the bonds ; but, as he had parted with them before his insolvency, that the rights of third parties had intervened, and they must be protected against loss through equities existing between the original parties.²

§ 51. Where a bill was filed to restrain the defendant from proceeding at law to obtain possession of the land in question, but an ejectment suit, commenced by the defendant after the bill was sworn to, but before it was filed, was not noticed in the bill ; held, an injunction, which did not permit the defendant to proceed to judgment in the ejectment, was irregular, though the commencement of that suit was unknown to the plaintiff at the time of filing the bill.³

§ 52. In ejectment cases, where no discovery is sought, and the title at law is admitted, an injunction will be granted upon

¹ Truly v. Warner, 5 How. 141.

² Carroll v. Sand, 10 Paige, 298.

³ Coster v. Griswold, 4 Edw. Ch. 364.

terms only, so as to leave the party to proceed to trial and judgment at law.¹

§ 53. A brought ejectment against B. B's wife and another, joining B as a necessary party, and alleging title in the wife, obtained an injunction against A from setting up any claim under his deeds, alleged to be a cloud on the wife's title, but making no reference to the pending ejectment. Thereupon judgment was given for A in the ejectment suit, without a trial by jury. Held erroneous, but also that the injunction did not in terms restrain the writ, and, if it did, the plaintiff could not proceed in violation of it, but must have leave under it to proceed at law.²

§ 54. To obtain an injunction of an action at law on account of *confusion of boundaries*, the complainant must allege such confusion, and set forth the circumstances which produce it.³

§ 55. Upon petition for an injunction to restrain proceedings at law, affecting real estate, until a decision upon a bill in equity for title to such real estate, if the bill upon demurrer be insufficient to sustain a decree, it is error to perpetuate the injunction.⁴

§ 56. A bill for enjoining a suit, brought to recover land, is not prevented by the plaintiff's assigning his title to the land, even to a resident of another State. The right is not an estate in the land, but a personal claim for relief, which does not pass by a conveyance of the plaintiff's title to the land, and which, it seems, is not assignable.⁵

§ 57. A, claiming a lien on land, commenced proceedings by attachments to enforce his lien; and B, claiming the land by another title, applied for an injunction to restrain A from

¹ Ham v. Schuyler, 2 John. Ch. 140.

² Wildy v. Bonney, 35 Miss. 77.

³ Foster, 6 Eng. 304.

⁴ Blakeney v. Ferguson, 4 Eng. 487.

⁵ Dunlap v. Stetson, 4 Mas. 349.

proceeding in his suit, and to enjoin him to release his title to B. The injunction was not granted.¹

§ 58. The doctrine of *estoppel* furnishes ground for injunction against suits at law. (See *Estoppel* ; also p. 277.)

§ 59. The court will restrain a party from enforcing a legal claim, where promises have been made to the person legally liable not to enforce it, upon the faith of which obligations have been entered into.² Thus it is held that, where a note was signed and delivered with an understanding that it should not be enforced, chancery will enjoin its enforcement.³ So a garnishee may enjoin the plaintiff, where his defence is, that for a consideration the plaintiff promised to pay the debt garnished.⁴ So where one accepts land devised to him, on condition of ratifying a previous sale by the testator, and sells portions thereof; he may be perpetually enjoined from proceeding at law to avoid the sale by the testator.⁵ So where the plaintiff sent the defendant a draft, telling him he might use it, if he would extend a certain overdue mortgage, which the plaintiff was under no personal liability to pay; and the defendant kept the draft but declined to stay his foreclosure suit unless he received more money on account of the mortgage: held, the defendant must accept the money on the terms offered, or not at all, and must return it or be bound by the condition. Also, that the plaintiff was not to be driven to his remedy at law, but might enjoin the foreclosure suit.⁶ So a widow may be enjoined from proceeding to procure the admeasurement of dower, where she is estopped, by knowingly permitting the purchaser of the land to part with his money, on her assurance that she made no claim to dower, and threatens to bring ejectment for dower.⁷

§ 60. And in the present connection it may be stated, though not precisely applicable to the subject of the present

¹ Gregg v. Cole, 5 Tex. 417.

² Money v. Jorden, 11 Eng. Law & Eq. 182.

³ Bell v. Gamble, 9 Humph. 117.

⁴ Matthews v. Robinson, 33 Ala. 320.

⁵ Leonard v. Crommelin, 1 Edw. Ch. 206.

⁶ Grinnan v. Platt, 31 Barb. 328.

⁷ Wood v. Seely, 32 N. Y. 105.

chapter, that, on the other hand, one may be debarred by estoppel from maintaining an injunction. Where one lies by and permits another to erect works at great expense, and to use them for several years without objection, he cannot come into equity for an injunction to restrain the use of such works in the same manner as they have been before used.¹ Thus where the complainants had agreed to allow the defendants to draw water, for running a mill, from a certain lake, the outlet of which flowed through the complainants' lands, and had suffered them to go on and construct a mill and race, at an expense of \$3,000, before informing them that they did not intend to abide by their promise; an injunction, which had been granted to restrain the taking of the water of the lake for the mill, was dissolved.² So where the complainant had stood by without objecting, and allowed the defendant to go on and expend a considerable amount of money in the erection of a mill, in violation of the terms of a grant made by the complainant, in consideration of the erection of the mill, and of the right to use the water of a creek in a particular manner; held, by his silence, he had waived all right to an injunction against diverting the water.³ (a)

§ 61. *Fraud* is another ground of interference. (See *Fraud*.) Thus A, very soon after coming of age, was induced by B, his superior officer, to accept bills for £3,000 at two months, for his accommodation, which were handed by B to C, a money-lender, in payment of a debt of £2,590. C,

¹ Southard v. Morris, &c., Saxt. 518.

² Jacox v. Clark, Walk. Ch. 249.

³ Payne v. Paddock, Walk. Ch. 487.

See Mitchell v. Leavitt, 30 Conn. 587.

(a) The court below having held, that a party, who by representations had induced another to enter into irrevocable engagements, must be restrained from taking proceedings to enforce obligations and promises, the abandonment of all intention to enforce which was the subject of those representations; the decree granting a perpetual injunction to restrain such proceedings was on appeal confirmed. Lord Justice Cranworth dissenting, first, because this case was not within the principle of the cases on which the decree below was professed to be grounded, there being no misrepresentation of fact; and secondly, because the promise alleged by the plaintiff was supported by the evidence of one witness only, who had since died, and which was not, in his lordship's opinion, supported by the surrounding circumstances, and was positively denied by the answer. *Money v. Jordan*, 13 Eng. Law & Eq. 245.

who was privy to the transaction, afterwards agreed to arrange a renewal of these, and another bill for £500 for twelve months, in consideration of A's note for £2,500 payable in three years, which sum C charged for his expenses and trouble. An injunction was granted against C to restrain a suit for the £2,500, there being reason to suppose, upon investigation, and evidence offered, that A might have been induced to give the note by misrepresentation as to the extent of his previous liability and the nature and extent of C's services.¹ So where, by misrepresentation, an act of Assembly had been obtained, whereby lands previously sold in accordance with a former act were included in a new grant; it was decreed that the second grantee should release such land to the State, by deed, and an ejectment against the claimant under the first act was enjoined.²

§ 62. Where A conveyed to B a piece of land, representing it to contain a coal mine, for which B promised to pay a certain sum, and an annuity, on condition that, in case the mine, after being faithfully and scientifically wrought, should not yield a certain quantity of coal, the annuity should cease; held, the judgment of reasonable men, who had examined the spot, and had actually worked upon it, that an attempt to work the mine would be useless, or attended with great expense and hazard, was sufficient to satisfy the condition; and A was enjoined from prosecuting any suit for recovering the annuity, or any part thereof.³ So, A having sued B on a promissory note, it appeared that the consideration for the note was an undertaking, on the part of A, that C should convey land to B, which A alleged that C owned, and for which, on the conveyance being made, B made to A a cash payment in addition to the note, fully covering the value of all C's interest in the land, which was but three fifths of what A had represented it to be. Held, the suit should be enjoined, without any offer on the part of B to rescind the sale.⁴ So where a creditor fraudulently aids and assists the principal

¹ Lloyd v. Clark, 6 Beav. 309.

² Dale v. Roosevelt, 5 John. Ch.

³ The State v. Reed, 4 Har. & 174.
M'Hen. 6.

⁴ Warren v. Carey, 5 Ind. 319.

debtor to remove from the county, with the intent to hinder and delay the surety in his remedy against the principal, equity will enjoin the creditor from enforcing his claim against the surety.¹ But where a decree in chancery had been reversed, on the ground of fraud practised in obtaining it, and the party was restored to his former situation, and an action at law had been brought for the fraud ; held, chancery would not grant an injunction against the suit.² So a creditor, having brought an action, with an accompanying attachment, cannot bring a second action in the Supreme Court, for the recovery of his debt, to set aside an alleged fraudulent judgment previously recovered against the debtor, and for an injunction to restrain the paying over of the proceeds of a sale of property levied upon by virtue of an execution issued on such judgment. In such cases, the creditor must wait until he has established his debt by judgment, before he will be entitled to an injunction, or other equitable relief, against the judgment alleged to be fraudulent. And, *it seems*, he has a complete remedy at law, by proceeding with the attachment suit, obtaining a judgment therein, and selling the property under it.³

§ 63. A and B were creditors of C. C confessed judgment in favor of A, and B obtained an injunction to stay proceedings by A upon his judgment, on the ground of fraud. While the injunction continued in force, B brought an action at law to enforce his debt, and, on petition by A, was put to his election to stay proceedings at law, or to dissolve the injunction.⁴

§ 64. *Mistake* is another ground of injunction against suits. (See Chap. VIII.) Thus, in a case of bastardy, a warrant was issued for the arrest of A, by virtue of which he was arrested and taken before a justice. A denied the charge, and offered to give security for his appearance at court. The justice, being told to do so by the constable, prepared a bond to indemnify the township, which A and his security

¹ Smith v. Hays, 1 Jones, Eq. 321.

² Peck v. Woodbridge, 3 Day, 508.

³ Mills v. Block, 30 Barb. 549.

⁴ Livingston v. Kane, 3 John. Ch. 224.

signed, supposing it to be an instrument of security for appearance. On the hearing, the court made no order of bastardy against A, yet the overseers of the township brought an action on the bond of indemnity. On bill filed, praying an injunction against further proceedings, and that the bond may be cancelled, the injunction was at once granted, and subsequently a decree was entered for the complainants.¹

§ 65. But in the following case this relief was refused.

§ 66. A purchased of B, by bond, part of a lot of land, subject to the legal title of B, and to C's claim for the price of the whole lot. He gave C a bond for the amount of his claim, and took from him, in return, a bond to convey. The consideration of B's bond was the payment of this claim, but it was not expressed, and, by mistake, the bond was given for a conveyance of the whole lot, although C knew the dimensions of the part purchased, and that the possession of the residue was in another person. The mistake and the consideration of B's bond were proved by his answer, and by parol evidence. A brought a bill to enjoin a suit on his bond, and for specific performance of C's. An injunction granted was finally dissolved, and it was decreed that C should convey the land originally purchased of B, on payment of his claim and his costs in both suits.²

§ 67. The court will interfere by injunction, to prevent, in all cases, the jurisdiction of the court, the validity of its process or orders, or the title of its *officers*, from being drawn in question in another court, by a suit against the officers or persons acting under the authority of the court. But where process has been irregularly issued, and set aside by the court on that account, or where an officer has transcended his authority; it is not a matter of course to stay proceedings against the wrong-doer in all other courts. And where process has been set aside for irregularity, the officer, or party, desiring the protection of the court for acts performed under

¹ Field v. Cory, 3 Halst. Ch. 574.

² Bickham v. Gough, 4 Har. & McHen. 17.

such process, must apply promptly ; and the application comes too late after judgment against him for such acts.¹

§ 68. Where an *executor*, residing out of the State, and being insolvent, is seeking to obtain a fund belonging to the estate, which it is feared may be wasted ; equity may and ought to restrain him by injunction from prosecuting his proceedings at law, until he submits himself to the jurisdiction of the court.² (See *Executors*.)

§ 69. Where a perpetual injunction was decreed by the vice-chancellor against a suit at law, which decree was *appealed from*, the chancellor refused to modify the injunction so as to let the suit at law proceed to judgment without prejudice, pending the appeal ; no particular necessity appearing for so doing.³

§ 70. A few miscellaneous points of practice remain to be stated.

§ 71. After a preliminary injunction, restraining a suit at law, had been dissolved, the plaintiff in such suit, before final decree in the court, had compelled the bail to pay the debt. Held, that these facts should have been brought before the court, by supplemental bill, without which they could not be taken into consideration, upon making the final decree.⁴

§ 72. When a court of equity has issued an order for an injunction restraining a party from bringing an action, the higher court will enforce such order by staying proceedings under the common law procedure act, 1852, 15 & 16 Vict. c. 76, § 226, although no writ of injunction has been actually issued.⁵

§ 73. A statute, requiring a release of errors on filing a bill for an injunction to stay proceedings at law, applies only to

¹ Mackay v. Bluckett, 9 Paige, 437.

² Dougherty v. Walker, 15 Geo. 442.

³ Fulton, &c. v. New York, &c., 3 Paige, 31.

⁴ Griswold v. Baker, 2 Edw. Ch. 461.

⁵ Cobbett v. Ludlam, 33 Eng. Law & Eq. 418.

the defendant in the law proceedings, and not to third persons.¹

§ 74. Where a bill in equity was brought to restrain a suit at law in another court, the parties filed an agreement, requesting that, if the court were of opinion they had not jurisdiction to grant the injunction, but that the facts stated in the bill would be a defence to the action at law, they would decide accordingly; and they agreed that the decision should bind the parties as if that suit were pending in the court in which the bill was filed. But the court declined to determine the point.²

§ 75. It is no sufficient reason for disregarding an injunction to restrain a suit, that, in the writ of injunction served, the suit restrained is described as one in which A B alone is a party, when in reality A B and wife are concerned; there being sufficient identification of the suit.³

§ 76. An injunction will not be granted to stay a trial at law on the eve of trial, where there has been delay. Otherwise where the trial is not near, and the defendant has time to answer.⁴

§ 77. In a case at issue' and ready for trial, the court will not allow a trial and judgment, if the usual injunction is granted by the chancellor during the term, though the object is to save delay and expense and only recover judgment.⁵

§ 78. Pendency of proceedings at chambers to settle the pleas to the action, is no ground for varying the form of an order for extending the common injunction to stay trial.⁶

§ 79. A, having demurred in an action brought by B, obtained an injunction upon the suit, and subsequently moved,

¹ *Sevier v. Ross*, 1 Freem. Ch. 519.

² *Stone v. Hobart*, 8 Pick. 464.

³ *Endicott v. Mathis*, 1 Stockt. 110.

⁴ *Holme v. Brown*, 9 Hare (41 Eng. Cha.), App. 28.

⁵ *Hutchinson v. Hutchinson*, 1 Houst. 613.

⁶ *Woodell v. White*, 3 Hare (25 Eng. Cha.), 411.

on the usual affidavit, to stay the trial of the action. The motion was ordered to stand over until judgment on the demurrer, which having been allowed, upon renewal of the motion, it was refused, with costs, upon the ground that the word *trial* referred to an *issue of fact*.¹

¹ *Lowe v. Faulkner*, 16 Sim. (39 Cha. Rep.) 249.

CHAPTER VII.

GROUND'S OF INJUNCTION—FRAUD.

1. General remark — fraud.
3. Fraud upon creditors.
6. Between the parties.
7. Pleading; answer; dissolving of injunction.
9. Acquiescence in the fraud; delay.

§ 1. HAVING now completed our view of those general topics in the law of injunction which apply alike to all the grounds for that equitable remedy; we proceed to consider the particular wrongs or injuries which may be thus prevented or redressed. We shall next treat of the *parties*, and then of the *subject-matters*, in this form of proceeding. It is to be remarked, however, that each of these several topics has been often referred to, and sometimes considered at length, in the several preliminary chapters, relating, respectively, to the general nature of injunction, the dissolving of injunctions, judgments and executions, and suits at law. Consequently, some of the succeeding chapters of the book will be found comparatively brief and fragmentary; their omissions, however, being readily supplied, with the aid of a copious Table of Contents and Index, by reference to the more full chapters which precede them.

§ 2. Prominent among the *wrongs*, to which the remedy of injunction is applied, is *fraud*; which is alike the subject-matter of general equitable relief, as peculiarly liable to the want of any adequate remedy at law, and also of injunction, as one of the most effective instruments of such relief.¹ (a)

¹ See *Wingate v. Haywood*, 40 N. H. 437; 2 Ves. 155; Leg. Intell., January 10, 1868.

(a) Mere *misrepresentation* will not always *prevent* the interference by injunction, even against the party injured by such misrepresentation. Thus an injunc-

§ 3. Injunction is often resorted to in case of alleged fraud upon creditors. Thus where a creditor's bill alleges the fraudulent execution of a bond by the defendant, upon which he is about to confess a judgment in fraud of creditors; an action on the bond will be enjoined. But the claim must be distinctly stated, and proper exhibits must accompany the bill.¹ (a) So attaching creditors of an insolvent may, before judgment, enjoin an execution against the property attached under a judgment alleged to be fraudulent; all the material allegations, except the fraud, being admitted.²

§ 4. In New York, it was formerly held, that only after judgment (and perhaps execution) at law against a debtor, will the court, in a proper case, grant an injunction to restrain him from disposing of his property.³ Also, that the 219th section of the Code applies only to the single case, where, pending a judgment about to be recovered, the defendant manifests an intent to place his property beyond the reach of an execution. And that a simple contract creditor, having acquired no lien on his debtor's property, cannot restrain the debtor and his assignee from further proceedings in a fraudulent assignment made before the commencement of the action.⁴ But, as the law now stands, an injunction may be issued, and a receiver (in the person of the sheriff) appointed, before judgment, at the instance of any creditor, and against any debtor, to prevent a fraudulent disposition of property, and as a security for the satisfaction of such judgment as the plaintiff may recover.⁵ So A, being insolvent, transferred his entire property to B, his brother and clerk, who was young, without family, experience, or property, for \$20,000, secured

¹ Mahaney v. Lazier, 16 Md. 69.

Wiggins v. Armstrong, 2 John. Ch.

² Heyneman v. Dannenberg, 6 Cal. 144.

376.

⁴ Reubens v. Joel, 3 Kern. 488.

³ Candler v. Pettit, 1 Paige, 168;

⁵ Mitchell v. Bettman, 25 Barb. 408.

tion was granted to stay an action against an auctioneer for the deposit, though the estate sold was represented as freehold with leasehold adjoining, and turned out nearly all leasehold, and though there had been great delay in making out the plaintiff's title. Fordyce v. Ford, 4 Bro. Ch. 370, 495.

(a) On the other hand, equity will assist a grantee from a trustee under a deed made in fraud of creditors, against those who are not creditors. Gridley v. Wynant, 23 How. 500.

only by the notes of B, and payable in one year with interest. The same day A assigned the notes to C for benefit of creditors, with preferences. Held, the two transfers constituted in law but one transaction, and there was sufficient evidence of fraud to justify an injunction.¹ So where creditors of an absent debtor had obtained an attachment against his goods, and a brother of the debtor, to whom the property had been fraudulently conveyed, was disposing of it and preventing the creditors from seizing it; held, the creditors had a lien under the attachment, which could be enforced by injunction, restraining the brother from disposing of the property, and removing it out of the jurisdiction of the court.² So where a steam-mill property and land are subject to dower and judgments to an amount exceeding their value; it is fraud on the part of the owner to sever and remove the engine or other machinery, in order that they may be seized on a subsequent execution as chattels; and equity will restrain such removal by injunction, on application of a judgment creditor. The point, whether such interference would be justified on the mere ground of *waste*, is left undecided.³

§ 5. But on a bill by creditors, to enjoin an administrator from confessing judgment on a bond, alleged to have been given by the intestate in fraud of creditors; a perpetual injunction cannot be decreed, without proof or an admission in the answer that the complainants are in fact creditors. The silence of the answer, in this respect, is not an admission of the fact.⁴ (See *Executors*.) So the alleged fraudulent transfer of his property by a debtor charged to be insolvent is no ground for injunction and the appointment of a receiver, without clear proof of fraud, and of imminent danger unless such relief is granted. It is not sufficient for the bill to charge positively that the defendant is indebted to the plaintiff, and to state, upon information and belief (but not the sources of information), a series of facts tending to show a fraudulent conveyance of all the defendant's property.⁵ So

¹ *Litchfield v. Pelton*, 6 Barb. 187.

² *Falconer v. Freeman*, 4 Sandf. Ch. 565.

³ *Witmer's, &c.*, 45 Penn. 455.

⁴ *Holliday v. Potter*, 3 Hawks, 198.

⁵ *Blondheim v. Moore*, 11 Md. 365.

where an assignment by a debtor, as set forth in a bill to set it aside as fraudulent, contained no provision which was illegal, or the necessary effect of which would be to defraud creditors, and the bill was not under oath; held, there was no ground for a preliminary injunction.¹ So where a bill alleged that the defendant was indebted to the complainants; that he was disposing of his property, collecting and secreting the debts due him, and, with intent and purpose to defraud his creditors, and before judgment could be recovered against him, after completing his sales and collections, to abscond: held, under the laws of Maryland, the bill disclosed no ground for an injunction, or appointment of receivers. Such a case is not within the act of 1835, c. 380, § 2.²

§ 6. Fraud *between the parties* may also furnish ground of injunction. Thus A obtained from B a deed of land, through fraud, in which C was concerned, and afterwards confessed a judgment to C, who assigned it to D for valuable consideration, without notice of the fraud. Held, the judgment created no valid lien upon the land, and a conveyance to B of the land must be decreed, discharged of the judgment, and a perpetual injunction awarded against its execution upon that land.³ So a bill in equity alleged, that A, one of the defendants, by false pretences of solvency procured goods from the plaintiffs on credit; that the other defendants assisted him in the deception, and afterwards, by fraudulent combination with him, to the prejudice of other creditors, and to cover antecedent claims of their own upon him, obtained the goods from him and designed to sell them at auction, at a great sacrifice; and that the plaintiffs had lost their remedy in replevin, as to most of the goods, by acts of the defendants in altering marks, &c. Held, a proper case for bill in equity, and for an injunction, as ancillary to a petition to avoid the transfer.⁴ So an action was brought by A against B, to recover the proceeds of sale of a ship, owned by them jointly, which sale B made as agent. The ship was sold twice, in

¹ Bogert v. Haight, 9 Paige, 297.

² Uhl v. Dillon, 10 Md. 500; Hubbard v. Hubbard, 14 Md. 356.

³ Livingston v. Hubbs, 2 John. Ch.

512.

⁴ Hyde v. Ellery, 18 Md. 496.

California and in China. It was alleged that the sale in California was fraudulent; that she was bid in for B; that B, as agent for the nominal purchaser, sold her in China for a much larger sum, and that A was entitled to share in the proceeds of the last sale. The complaint prayed an injunction to prevent the disposal by B, during the pendency of the suit, of the proceeds of the last sale, they being identified as specie drafts and credits in his hands. An order of injunction was granted. On a subsequent application the injunction was continued, though the allegations in relation to the California sale were denied by B in his answer and affidavit, it not appearing to the court that the plaintiff's case was thus overborne.¹ But a decree for an injunction, upon evidence that a mare was unsound at the time of the sale, the *scienter* and fraudulent concealment not being proved, is erroneous.²

§ 7. Where, in a suit in equity, facts are admitted, from which the court or jury may properly infer a fraudulent intent; a general denial of fraud will not prevent an injunction, and it should continue till final judgment.³

§ 8. A suit at law on a specialty cannot be avoided, by pleading that it was obtained by the plaintiff's fraudulent misrepresentations. Where, in such suit, the defendant sought an injunction, and the respondent, in his answer, denied the equity of the bill; held, an exception to the general rule, that, if the bill is fully answered, and its equity denied, the injunction should be dissolved. But upon the following facts, that A, professing to be with child by B, obtained the bond of B and C in full satisfaction, on which she afterwards sued; and B obtained an injunction by alleging fraud, but did not deny having had sexual intercourse with A; and she answered, denying his equity: held, that, since the bill could not bear scrutiny *in foro conscientiae*, the court could not make this case an exception, but would dissolve the injunction.⁴

¹ *Merritt v. Thompson*, 3 E. D. Smith, 283.

² *Howell v. Freeman*, 1 J. J. Marsh. 54.

³ *Litchfield v. Pelton*, 6 Barb. 187.

⁴ *Leigh v. Clark*, 3 Stockt. 110.

§ 9. Acquiescence in the alleged fraud will prevent an injunction founded upon such fraud. Thus, in an action to restrain a school district board from paying wages to a teacher, the complaint alleged, that the "certificate" of the county superintendent held by her, and her contract with the board, had been obtained by fraud; but, the court presuming from the complaint (on demurrer), in the absence of any allegation to the contrary, that the plaintiff was aware of the several acts of fraud at about the time when they were committed, and had made no effort to have the certificate revoked by the superintendent, and the action not having been commenced until the teacher had taught under her contract about two months: held, the plaintiff must be regarded as having acquiesced in the fraud, by delay, and was not entitled to the interference of a court of equity.¹

¹ *Helms v. McFadden*, 18 Wis. 191.

CHAPTER VIII.

ACCIDENT AND MISTAKE.

§ 1. ANOTHER ground of injunction is *accident and mistake*. (See p. 286.) The distinction between accident and mistake is thus pointed out by approved writers. Accident is “an occurrence in relation to a contract, which was not anticipated by the parties, when the same was entered into, and which gives an undue advantage to one of them over the other, in a court of law.”¹ Accident is “not merely inevitable casualty, or the act of Providence, or what is technically called *vis major*, or irresistible force; but such unforeseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or misconduct in the party.”² Mistake is “that result of ignorance of law, or of fact, which has led a person to commit that which, if he had not been in error, he would not have done.”³

§ 2. Where a party, with a full knowledge of all the facts, pays or executes his note for money, voluntarily, under a mistake of law, he cannot recover back the money, or enjoin the collection of the note, on the ground of mistake.⁴ So it is no ground for continuing an injunction upon a judgment at law, that there is a mistake in a title bond of the description of the land, without showing that the other party, on request, refused to correct the mistake.⁵ So an injunction does not lie to restrain the plaintiff in an action from taking out money alleged to have been paid into court by the defendant in such action through mistake.⁶ But where A, being in possession of land owned by the State, as a settler, conveyed one acre to

¹ Jeremy, Eq. Juris. 358.

² 1 Story, Eq. sect. 78.

³ Jeremy, Eq. Juris. 385.

⁴ Hubbard v. Martin, 8 Yerg. 498.

⁵ Long v. Brown, 4 Ala. 622.

⁶ Great, &c. v. Cripps, 5 Hare (26 Eng. Ch.), 59.

B ; and C afterwards obtained A's title, the deeds all excepting B's acre ; and the State conveyed the whole of the land to C : held, B was entitled to relief against this conveyance, and a judgment founded thereon.¹ And, on the other hand, equity will not enjoin proceedings to correct a mistake in reference to lands. Thus a corporation empowered by special acts, which embodied the act of 8 & 9 Vict. c. 18, to construct water-works, and to take certain lands, required lands belonging to A and B, the boundary between which was improperly described in their plans and books of reference. In consideration of B's withdrawing his opposition to their bill in committee, they agreed to settle the value of the land required from and the compensation due to him, by arbitration under the above act, and to fix the exact quantity of land within six months after the passing of the bill. In the proceedings under the reference to arbitration, the mistake of the boundary was pointed out ; but the award fixed a value, in terms, only for the land within the boundary so inaccurately delineated, and the corporation took that land accordingly, leaving between it and the true boundary line a narrow strip of land belonging to B, but which the corporation had agreed to purchase from A as part of this land, and for which they paid a sum of money to A, and of which they took possession as part of the land purchased from A. B recovered the strip of land afterwards from the corporation in ejectment, and a rule for a new trial was refused. The corporation thereupon proceeded, within six months from such refusal, to make themselves legal owners of the strip of land in question, under the compulsory powers given in case of mistake by the 124th section of the lands clauses consolidation act above mentioned. B filed a bill for an injunction to restrain them from so doing, which, upon motion, was refused with costs. Held, that the circumstances amounted to mistake, within the meaning of the 124th section. Also, that this section applied to land altogether omitted to be purchased by mistake, as well as an outstanding interest therein so omitted to be purchased.² So, at a certain time, the ordinary method of removing a case

¹ *Dunlap v. Stetson*, 4 Mas. 349.

² *Hyde v. Manchester*, 10 Eng. Law & Eq. 42.

from a justice's court was by *certiorari*, grantable by a judge, to be applied for within ninety days after judgment. An act was passed, authorizing the clerks of the district courts to issue writs of *certiorari*, and a party obtained one from the clerk; but the law was decided to be unconstitutional. Held, the mistake of the law was sufficient excuse of the party for not having obtained a *certiorari* in due time from the district judge, and, on a showing of merits, he was entitled to an injunction.¹

§ 3. In the case of a company formed for mining purposes in Nevada, the true report of which, it is said by the court, "reads more like a novel than anything in real life," the prospectus referred to the memorandum and articles of association, as accessible at the company's offices, and commended at length a mine, the purchase of which had been contracted for. This mine being found worthless, the directors rescinded the contract, and agreed to purchase another. The plaintiff had become a subscriber on the faith of this prospectus, and was threatened with proceedings to recover the calls. Held, he was entitled to an injunction against such proceedings, although the directors had been themselves deceived, and were guilty of no wilful fraud, and without paying the amount of the call into court.²

¹ Cobbs v. Coleman, 14 Tex. 594.

² Smith v. Reese, &c., Law Rep. (Eng.) Eq., July, 1866, p. 263.

CHAPTER IX.

NUISANCE.

1. General jurisdiction.
2. Restrictions.
3. Public nuisance.
15. *Abatement.*

§ 1. A VERY frequent ground of injunction is *nuisance*. It is held that, in cases of private nuisance, the jurisdiction of courts of equity and of law is often concurrent, though many cases will sustain a legal action, which would not justify relief in equity.¹ The established rule on this subject is, that chancery has power to interpose in behalf of one who is injured by a continuing, permanent, or recurring private nuisance, unless the injury be such as may be compensated in damages.² So when a nuisance is likely to occasion a special injury to one individual, which cannot well be compensated in damages, equity will entertain jurisdiction of the case at his suit.³ In a case in Massachusetts, the court remarked, "It was contended, in argument, that the court would take jurisdiction of nuisances only in urgent cases, where the prompt interposition of the court is necessary, by immediate injunction, and where the proceedings at law would be too slow. But we think this no test of the superior efficacy and completeness of the remedy in equity, although it is one of its advantages. We think it sufficient that the remedy in equity is more adequate, and better adapted to meet the justice of the case, and more complete by being at once more comprehensive and effectual."⁴ And, in a recent case in Pennsylvania, the court give a concise and comprehensive view of the general grounds for

¹ *Parker v. Winnipiseogee, &c.*, 2 Black, 545.

² *Norris v. Hill*, 1 Mann. 202; *Clack v. White*, 2 Swan, 540; 1 Gill & J. 184.

³ *Milhan v. Sharp*, 28 Barb. 228.

⁴ Per Shaw, C. J., *Bemis v. Upham*, 18 Pick. 171.

an injunction, in the remark — “The loss of *health and sleep*, the enjoyment of *quiet and repose*, and the *comforts of home*, cannot be restored or compensated in money.”¹ In another case, the test is adopted, of that which injuriously affects the ordinary comfort of human existence; not necessarily *health*.² And in still another case the following remarks are found, of general applicability: “The Court of Chancery has authority to grant injunctions to restrain parties from the use of their own lands and buildings for trades and purposes in themselves lawful but necessarily so noxious, unhealthy, dangerous, or unwholesome to the occupants of neighboring buildings as to destroy, or seriously and substantially to impair, their value for the purposes for which they were designed. Each application for the exercise of this extraordinary power is addressed to the judgment of the court upon its own peculiar facts.”

§ 1 a. In conformity with these views, equity may enjoin the owner of land, adjoining the plaintiff's premises, from removing any soil, in such manner as to cause the plaintiff's land, by reason of the withdrawal of its lateral support, to fall away or subside.³ (See Chap. XXVII.) So an ordinance of a city council, ordering a blacksmith's shop to be closed, as a nuisance, is authorized by law, and may be carried into effect by an injunction, restraining the owner from continuing it.⁴ So an injunction was granted, after a trial at law, against the ringing of the bells of a Roman Catholic church, so as to annoy or disturb the plaintiff who lived very near the church.⁵ So a bill was brought against the defendants, the church-wardens, and against the parson and overseers of the town of Hammersmith, to stay the ringing of the five o'clock bell of the town, which had usually been rung at five o'clock A. M. from Michaelmas to Candlemas, except upon holy days, and the twelve days at Christmas. The plaintiffs, husband and wife, had a house near the church, and she, being an invalid, was much disturbed by the bell, and

¹ Per Thompson, J., *Dennis v. Ehardt*, (Pennsylvania) Law Reg., January, 1863, p. 169.

² *Crump v. Lambert*, Law Rep. (Eng.) Eq., April, 1867, p. 408.

³ *Farrand v. Marshall*, 21 Barb. 409.

⁴ *New Orleans v. Lambert*, 14 La. An. 247.

⁵ *Soltan v. De Held*, 2 Sim. N. S. 132.

about to remove. An agreement was then made, that the plaintiffs should build a cupola to the church, and erect a clock and new bell, provided that during their respective lives the five o'clock bell should not be rung. The plaintiffs thereupon made the agreed erections, and the five o'clock bell was silenced for about two years. But the defendant, Watkin, an ale-house keeper, being since chosen church-warden, a new order of vestry was obtained for the ringing again of the five o'clock bell. Held, an injunction should be granted for the lives of the plaintiffs, "for here was a meritorious consideration; the church-wardens were a corporation, and might sell the bells or silence them, and make a reasonable agreement, and thereby bind the parishioners and their successors as also the succeeding church-wardens; that the ringing did not seem to be of any use to the parish, though of very ill consequence to the plaintiff, the Lady Howard, and ample recompense had been made, both in the expense of the *cupola*, &c., and also of £1,500 in improving the plaintiffs' own house, which otherwise they would have left; and it, moreover, appearing that the majority and better part of the parish continued willing to abide by this agreement and protested against the new order."¹ So the defendants, a railroad corporation, bound by their charter to fence their road, for the purpose of constructing a permanent fence along their track through the meadow of the orator, which was subject to overflow, began to plant willows upon each side of the track, upon the land used by them, and within three feet of his line, with the expectation that they would grow, and that boards might be attached to them, forming a fence, which, in the opinion of the officers, would be more permanent, useful, and economical than any other kind of fence. It appeared that the land would be seriously injured by the roots and branches of the trees, and that there was no absolute necessity for thus making a fence. Held, the planting of the trees might be enjoined.² (See Chap. XXVI.)

§ 1 b. "Certain leading considerations, besides the proximity and use of the property complained of, generally enter into

¹ *Martin v. Watkin*, 2 P. Wms. 266.

² *Brock v. Connecticut, &c.*, 35 Verm. 273.

the determination of these cases. Among these are the character of the property which asks protection; one slaughter house would not be harmed by another. The priority of use; one who voluntarily builds under the eaves of a building used for a noxious but lawful trade, cannot complain of it as reasonably as if his own building was erected first. The general location; what is inconvenient in a small village might be intolerable in a crowded city."¹ So where the smoke, effluvia, and noise, proceeding from a factory and its chimney, constitute a material addition to previous similar nuisances in a manufacturing town; they may be restrained by injunction.² So a lawful business, carried on at unreasonable hours, to the annoyance and discomfort of neighbors. As where a tinsmith and sheet-iron worker worked until eleven o'clock at night.³ Or the bleating of calves over night at a slaughter-house; or offensive smells thereby caused — the plaintiff's family residing near.⁴ Or the keeping and standing of jacks and stallions in immediate view of a dwelling-house.⁵ So a bill in equity, stating that a stable, in course of erection by the defendant, is to be used as a livery stable, and will by its proximity render the plaintiff's house untenable, break up his business, and diminish the rents of his stores, and praying an injunction; is not demurrable, because it does not state that the rights of the parties have been settled at law, or for want of equity, or because the nuisance is a proper subject for a suit at law.⁶

§ 2. But, it is said, ordinarily equity interferes in case of nuisance, only to restrain irreparable mischief, suppress interminable litigation, or prevent a multiplicity of suits. And in these cases equity will not ordinarily decide that such nuisance exists, if controverted, but will require that the complainant first establish his right at law, except where he has been in the long, quiet, and uninterrupted enjoyment of the right, in which case the other party may be enjoined until he proves his own title.⁷ "It is not every violation of the rights

¹ Per Steele, J., *Curtis v. Winslow*, 38 Verm. 691-2.

² *Crump v. Lambert*, Law Rep. (Eng.) Eq., April, 1867, p. 408.

³ *Dennis v. Eckhardt*, 3 Grant, 390.

⁴ *Bishop v. Banks*, 33 Conn. 118.

⁵ *Hayden v. Tucker*, 37 Mis. 214.

⁶ *Aldrich v. Howard*, 7 R. I. 87.

⁷ *Bean v. Coleman*, 44 N. H. 539.

of another which may be ranked under the general head of nuisance, which will authorize the interposition of this court by means of an injunction. It must be a case of strong and imperious necessity, or the right must have been previously established at law, or it must have been long enjoyed without interruption.”¹ So, in a recent English case, it is said, “The jurisdiction of this court over nuisance by injunction at all is of recent growth, has not till very lately been much exercised, and has at various times found great reluctance on the part of the learned judges to use it, even in cases where the thing or the act complained of was admitted to be directly and immediately hurtful to the complainant.”² Conformably with these views, where a matter complained of is not, in itself, a nuisance, but may be so according to circumstances, those circumstances must be ascertained by the verdict of a jury, before chancery will interfere by injunction.³ Mere diminution of the value of property, without irreparable mischief, will not furnish any foundation for equitable relief.⁴ So where, upon the bill and answer, the structure complained of is not *prima facie* a nuisance, the injunction will not be continued, but the defendant will proceed with his acts at his peril.⁵ So where damages will compensate, either the benefit derived, or the loss suffered, from a nuisance, equity will not interfere.⁶ Nor if the evidence is conflicting, and the injury doubtful, eventual, or contingent.⁷ More especially where an issue at law thereon has been twice found in favor of the defendants.⁸ So a bill in equity, praying for an injunction to suppress a nuisance to the plaintiff’s land, will be dismissed on general demurrer, for want of equity, unless it appears, from the subject-matter affected by the alleged nuisance, and the extent and nature of the injury to be apprehended from it, that there is danger of irreparable mischief, or of an injury such that it

¹ Per Appleton, J., *Jordan v. Woodward*, 38 Maine, 424.

² Per Lord Brougham, *Ripon v. Hobart*, 3 My. & K. 169.

³ *Kirkman v. Handy*, 11 Humph. 406; 1 Grant, 412; *Wolcott v. Melick*, 3 Stockt. 204.

⁴ *Zabriskie v. Jersey, &c.*, 2 Beasl. 314.

⁵ *Cunningham v. Rice*, 28 Geo. 30; *Muggatt v. Goetchins*, 20 Ib. 350.

⁶ *Grey v. Ohio, &c.*, 1 Grant’s Cas. 412.

⁷ *Laughlin v. President, &c.*, 6 Ind. 223; *Butler v. Rogers*, 1 Stockt. 487; *Ellison v. Commissioners*, 5 Jones, Eq. 57; *Dover v. Portsmouth, &c.*, 17 N. H. 200.

⁸ *Davidson v. Isham*, 1 Stockt. 186.

cannot be adequately compensated in a suit at law, or that the right of the plaintiff to enjoy the land, free from the molestation complained of, has been established in a suit at law.¹ And in very recent cases it is held, that equity will not interfere to prevent or abate, as a nuisance, everything that works hurt, inconvenience, or damage, but only where the injury is irreparable, as loss of health or trade, or in case of destruction of the means of subsistence, or the permanent destruction of property.² So an injunction was refused, where a certain kind of fuel, though injurious to neighboring owners, was necessary for a large business, being the manufacture of articles demanded for public use; the fuel and process of manufacture being the same as in similar establishments, and no injury being negligently or wilfully inflicted.³ So equity will not enjoin the location of cemeteries, where burial is carefully done, near a dwelling.⁴ Nor restrain parties from clearing their marsh-lands, upon the allegation in a bill that it will impair the health of a neighborhood.⁵ So where a riparian proprietor of land upon a lake obtains either a legal or equitable title to adjoining land filled in by the State; he cannot be enjoined from planting trees thereon, although they may obstruct his neighbor's view of the lake.⁶ And the *amount* of injury is sometimes a material consideration. Thus a gas company was incorporated by act of Parliament, for the purpose of supplying the town of S. with gas. Some years afterwards, another company was formed, and registered under the joint-stock companies registration act, for a like purpose, and commenced opening up the streets and highways of S. to lay down their pipes, &c., some of the inhabitants approving, and some disapproving, of the works. Upon an information and bill by the incorporated company, the court (Sir J. L. Knight Bruce, L. J., *dissentiente*) refused an injunction to restrain the new company from continuing their works, the nuisance, or damage being trivial.⁷ So an injunction was refused, against the burning of bricks upon ground of which the

¹ *Coe v. Lake Co.*, 37 N. H. 254.

² *Wolcott v. Melick*, 3 Stockt. 204.

³ *Richards v. Phoenix, &c.*, Law Reg., April, 1868, p. 356. (See p. 307 n.)

⁴ *Ellison v. Commissioners, &c.*, 5 Jones, Eq. 57.

⁵ *Ib.*

⁶ *Ledyard v. Ten Eyck*, 36 Barb.

102.

⁷ *Attorney-General v. Sheffield Gas Co.*, 19 Eng. Law & Eq. 639.

defendant had taken a building lease to build New Bond Street, and near to the plaintiff's houses; for the reasons that, if a final injunction were denied, the defendant would be irretrievably injured by non-fulfilment of contracts; that burning brick-kilns were standing in all parts, and some almost in the heart of some of the principal streets; and that there was a sufficient remedy at law, unlike the case of cutting down avenues or the like.¹ And in the case of a bill for an injunction, to stay building a hospital for people infected with the small-pox in "Cold Bath Fields," very near the houses of several tenants of the plaintiff; Lord Hardwicke said, "I cannot make any order in this matter; I am of opinion it is a charity like to prove of great advantage to mankind. Such an hospital must not be far from a town, because those that are attacked with that disorder in a natural way may not be in a condition to be carried far."² (a)

¹ *Duke, &c. v. Hilliard*, 18 Ves. 219; ² *Baines v. Baker*, 1 Ambl. 158.
1 Ambl. 159.

(a) The following recent case is found in the (Philadelphia) Legal Intelligencer. *Richards v. Phoenix Iron Co.* Appeal from the Common Pleas of Chester County. Opinion of the court by Thompson, C. J. (See p. 306.)

The complainant in this case is the owner of a dwelling-house and cotton factory in the village of Phoenixville, Chester County; and the respondents are owners of very extensive iron works in the same village. The former complains that by reason of the kind of fuel used by the latter in their works, his residence is rendered uncomfortable and unwholesome, and his factory materially injured in the discoloration of his fabrics and deterioration of his machinery. Claiming that this was established, he asked the court below for a perpetual injunction to restrain the respondents from using the fuel, bituminous and semi-bituminous coal, complained of as the cause of the injury to his property, in these furnaces. The case was heard on bill and answer, and the court decided against him. He was then permitted to file a replication and take testimony, on which there is a report of a master also against him. The court having sustained the report, again refused to enjoin the defendants, and the case is before us on an appeal, and we are asked to do what the court below refused, namely, to perpetually restrain the defendants from using bituminous or semi-bituminous coal in their furnaces.

The defendants' works are very extensive, the largest, so it is said, of any of the kind in the Commonwealth, consisting of several blast furnaces, some seventy puddling furnaces, and rolling mills and other machinery. They began on a small scale some forty-nine or fifty years ago, and up to 1840 used bituminous coal exclusively. The original works were not precisely on the spot of those complained of, but so near it as to entitle the latter to be regarded as an extension of the former. The extensions made in the works in 1837, 1846, and 1853, constitute the present works, the cost of which alone is represented as exceed-

§ 3. The question has often been held material, whether an alleged nuisance is *private* or *public*. (a) Upon this sub-

(a) In New Jersey, equity will not interfere, by injunction, to redress public nuisances, where the object sought can be attained in the ordinary tribunals. *Water Commissioners v. Hudson*, 2 Beas. 420.

The (New York) Supreme Court may enjoin a structure in the New York harbor as a nuisance, and order its removal. *People v. Vanderbilt*, 26 N. Y. (12 Smith) 287.

An injunction on application of the attorney-general is the proper remedy to prevent the erection of a purpresture and nuisance in a harbor or navigable river. *People v. Vanderbilt*, 28 N. Y. (1 Tiff.) 396.

In California, an injunction will not lie against a wharf in tide-water, which is not a public nuisance. *People v. Davidson*, 30 Cal. 379.

ing half a million of dollars, and which at the time of taking the testimony and previously, employed, as the master reports, from eight hundred to one thousand hands.

The plaintiff's dwelling, it appears, is situated on a bluff or hill northwardly from the defendants' works, about seventy feet above the nearest furnace floor, which brings its first story about on a level with the top of the puddling stacks, and when the wind is towards the plaintiff's house, and from the furnace, the consequence is that it is at times enveloped in a coal smoke thrown out of the chimneys of the puddling furnaces. It cannot be doubted, I think, that this materially operates to injure the dwelling-house as a dwelling, and consequently to deteriorate its value. The alleged injury to the factory is mainly that the smoke and soot of the furnace blackens the stock and renders the fabrics less salable. This I can readily understand and believe. The house was erected in 1829, and the factory in 1834, and both have been generally occupied ever since; the factory not doing full work for some time past, as the master reports.

A careful consideration of the testimony satisfies us that the use of semi-bituminous coal, the fuel complained of, is necessary to the successful manufacture of iron fit for axles, cannon, and the like, and in the manufacture of which the defendants are largely engaged; that the process of manufacture and fuel are those generally employed in similar establishments, and that there was neither a negligent nor wilful infliction of injury upon the plaintiff or his property in the defendants' mode of operating their works. Whatever of injury may have, or shall result to his property from the defendants' works by reason of the nuisance complained of, is such only as is incident to a lawful business conducted in the ordinary way and by no unusual means. Still there may be injury to the plaintiff; but this of itself may not entitle him to the remedy he seeks. It may not, if ever so clearly established, be a case in which equity ought to enjoin the defendants in the use of a material necessary to the successful production of an article of such prime necessity as good iron; especially if it be very certain that a greater injury would ensue by enjoining than would result from a refusal to enjoin. If we were able with certainty to say that the use of semi-bituminous coal, in the process of making good iron by the puddling process was unnecessary, and other fuel was equally good and available, or that by a reasonable expenditure of money on the works, all injury might be avoided, a different case might appear to our minds as chancellors, and we might then say that the cause of injury should cease, and that a decree in terms to

ject Judge Story remarks : " Nuisances may be of two sorts :
1. Such as are injurious to the public at large, or to public rights ; 2. Such as are injurious to the rights and interests of

meet such a contingency should be made so as to prevent the injury. But we have not this case before us. Bituminous, or at least semi-bituminous coal, we think from the testimony, is necessary in the manufacture of iron, such as the business of the defendants require, and whose fabrics the public need. Nor are we shown by testimony or reliable tests of any kind, that the smoke produced in the puddling process can be consumed, as it undoubtedly may be, in ordinary chimneys, or when produced in furnaces used to propel machinery. I am personally cognizant that this may be done, from observation both in this country and England ; and I have therefore read with satisfaction and entire conviction of the truth, the article from the London Quarterly of 1866, so largely quoted by the learned counsel for the appellants ; but I would be very unwilling to act on this conviction on this theory any further than to the extent to which experiment has gone. I would require very clear proof of the practicability of the application of the principle to uses dissimilar or partially so, as puddling chimneys from common furnace smoke stacks. The defendants seem willing to test the applicability of smoke consumers to puddling furnaces, and at the same time express their doubts in a practical shape by offering \$50,000 for an invention which will consume the smoke of their puddling stacks without impairing the efficiency of their power of manufacturing iron. However this may be, certain it is, we are not able to say from anything shown, that the fuel complained of can be remedied by the application of smoke consumers. We do not know what effect their application might have on the process. Nor do we think we should visit the defendants, because they might be unwilling to add to the height of their chimneys without knowing what effect it would have, or because they might not be willing to tear down their establishment and reërect it on Seiman's plan or patent. What effect these remedies, or either of them ought to have on the mind of a chancellor, if practicable, if the injury complained of was absolutely irreparable, we are not called upon to say, for such is evidently not the case here if there be any damage, as we shall presently show.

The rule on this subject is well stated in *Gray v. The Ohio & Penna. R. R. Co.*, 1 Grant's Cases, thus : " Where damages will compensate either the benefits derived or the loss suffered from a nuisance, equity will not interfere." See also *Hilliard on Injunc.* 271 ; *Adams, Eq.* 485 ; *Fonblanque's Eq.* 51 ; 2 *Story's Eq.* § 925, et seq. ; *Eden on Inj.* 269. In *Coe v. Lake*, 37 N. H. 254, it was said where the bill prayed an injunction to suppress a nuisance to the plaintiff's land, it might be dismissed on general demurrer for want of equity, unless it appeared from the subject-matter affected by the alleged nuisance that there was danger of irreparable mischief, or of an injury such as could not be adequately compensated in a suit at law. These and many other authorities to the same effect, some of which are on the paper book of the appellees, prove conclusively that as a general rule, mischief or damage is not irreparable which is susceptible of being compensated in damages. We have no doubt that an action at law will lie for an injury to property for causes similar to those mentioned in this bill, and if so why will not the remedy be adequate in such case, and thus the injury be repaired in damages ? We are not to presume that it will not be. This would be to impugn the justice of our common law forms without a reason. We think

private persons. In regard to public nuisances, the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen

under the circumstances of the case that the injunction ought to be refused, and the plaintiff left to his action at law for the recovery of such damages as he may have sustained or may sustain.

An error seems somewhat prevalent in portions, at least, of this Commonwealth in regard to proceedings in equity to restrain the commission of nuisances. It seems to be supposed that, as at law, whenever a case is made out of wrongful acts on the one side and consequent injury on the other, a decree to restrain the act complained of must as certainly follow as a judgment would follow a verdict in a common law court. This is a mistake. It is elementary law, that in equity a decree is never of right, as a judgment at law is, but of grace. Hence the chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing and leaving the party to his redress at the hands of a court and jury. If in conscience the former should appear he will refuse to enjoin. *Hiltio v. The Earl of Granville*, 1 Craig & Ph. Ch. R. 292; *Grey v. The Ohio & Penna. R. R. Co. sup.* We think this is a safe rule, and that the case we are considering is within it. With these views, and on full consideration of all the testimony in the case, we are of opinion the injunction was properly refused in the court below, and that the decree dismissing the plaintiff's bill with costs must be affirmed.

Appeal dismissed at the cost of the appellant.

And in another recent case in Pennsylvania (*Sparhawk v. Union, &c., Leg. Intel.* (Philadelphia), Nov. 22, 1867) the following distinctions are made by Mr. Justice Thompson, as to the *nature* of the disturbance or annoyance necessary to constitute it a legal nuisance.

"Religious meditation, and devotional exercises, are a duty and a privilege undoubtedly, but result nevertheless from sentiments not universal in their demonstrations by any means, but peculiar to individuals rather than to the whole community. Of this, like the matter referred to in the authority cited, injury to it by disturbance cannot be measured by any standard applicable to the privation of ordinary comfort. It cannot be affirmed, in regard to the devotional exercise embraced within the privilege, that it is more than a mental disturbance—an inconvenience. Human tribunals cannot tell anything about the effect of mere noise occasioned by ordinary employments on the mind. The belief is reasonable that its operations are independent of such physical facts, that it is cognizant of its own impulse and emotions under all ordinary circumstances, when in its normal condition and free from disease. This is the rule of the criminal law, and it has never been held that a disturbance from ordinary causes excuses a criminal act. It seems to me, that the rule expressed in the cases referred to is the only true one in judging of injury from alleged nuisances, viz., such as naturally and necessarily result to all alike who come within their influence. Not to one on account of peculiar sentiments, feelings, or tastes, if it would have no effect on another or all others without these peculiar sentiments or tastes. Not to a sectarian if it would not be to one belonging to no church. It must be something about the effects of which all agree; otherwise, that which might be no nuisance to the majority, might be claimed to deteriorate property by particular persons. Noises which disturb sleep, bodily rest, a physical neces-

Elizabeth. The instances of the interposition of the court, however, are, it is said, rare, and principally confined to informations seeking preventive relief. Thus, informations in equity have been maintained against a public nuisance by stopping a highway. Analogous to that, there have been many cases in the Court of Exchequer of nuisances to harbors, which are a species of highway; but the question of nuisance or not must, in cases of doubt, be tried by a jury; and the injunction will be granted or not, as that fact is decided. And the court, in the exercise of its jurisdiction, will direct the matter to be tried upon an indictment, and reserve its decree accordingly.—In the first place, they can interpose, where the courts of law cannot, to restrain and

sity; noxious gases, sickening smells, corrupted waters, and the like, usually affect the mass of the community in one and the same way, and may be testified to by all possessed of their natural senses, and can be judged of by their probable effect on health and comfort, and in this way damages may be perceived and estimated. Not so of that which only affects thought or meditation. What would disturb one in his reflections might not affect another. There can be no general rule or experience as to this; it is incapable of being judged of like those things which affect health or comfort. We are not without authority on this point. *Owens v. Henman*, 1 W. & S. 548, was a common law action, it is true, but which does not affect the principle; the action was for disturbing the plaintiff, a member of the 'Old Presbyterian Church of Wysox,' by loud noises in singing, reading, and talking, so that the plaintiff, as he alleged in his narr, was prevented from hearing the preacher or joining in the religious exercises of the occasion. The court decided for the defendant on the demurrer, and on error it was affirmed. Sergeant, J., in delivering the opinion of the court, said: 'In the first place, the injury alleged is not the ground of an action. He (the plaintiff) claims no right in the building, or any pew in it, *which has been invaded*. There is no damage to *his property, health, reputation, or person*. He is disturbed in listening to a sermon by noises. Could an action be brought by every person whose mind or feelings were disturbed in listening to a discourse or any other *mental exercise* (and it must be the same whether in church or elsewhere) by the noises, voluntary or involuntary, of others, the field of litigation would be extended beyond endurance. The injury, however, is not of a *temporal nature*; it is altogether of a *spiritual character for which no action lies*. It is settled that an action on the case does not lie where there is not any temporal damage, as, against a woman, who pretends herself single, and inveigles a man into a marriage, whereby he is disturbed in his conscience. 1 Com. Dig. 180; 1 Lev. 247. Nor does it lie for refusing to administer the sacrament. 1 Sid. 34. Nor for not reading divine service to plaintiff and the tenants of his manor. 5 Co. 73. In 5 B. & A. 356, it was decided that action will not lie for disturbing the plaintiff in the occupation of a seat in the body of a church, though he had contributed to the making of the seats.' To the same point is the *First Baptist Church v. The Utica and Schen. R. R. Co.*, 5 Barbour, 313, in which is cited the last mentioned case."

prevent such nuisances which are threatened or are in progress, as well as to abate those already existing. In the next place by a perpetual injunction the remedy is made complete through all future time; whereas, an information or indictment at the common law can only dispose of the present nuisance, and for future acts new prosecutions must be brought. In the next place, the remedial justice in equity may be prompt and immediate before irreparable mischief is done; whereas, at law, nothing can be done, except after a trial, and upon the award of judgment. In the next place, a court of equity will not only interfere upon the information of the attorney-general, but also upon the application of private parties, directly affected by the nuisance; whereas, at law, in many cases the remedy is, or may be, solely through the instrumentality of the attorney-general. But, in all cases of this sort, courts of equity will grant an injunction to restrain a public nuisance only in cases where the fact is clearly made out upon determinate and satisfactory evidence.”¹

§ 4. Upon the same subject, the somewhat unsettled state of the law may be best illustrated by citing the observations of eminent judges in some leading cases.

§ 5. “If the subject were represented as a mere public nuisance I could not interfere, as the attorney-general is not a party; and if he were a party, the complaint must not be of a public nuisance merely, but which, being so in its nature, is attended with extreme probability of irreparable injury, nor could the court interfere with it after a trial by law.”²

§ 6. “Where the bill is filed by the attorney-general, and the right is clear, and the threatened injury irreparable, an injunction will be awarded although the right has not been established at law.”³

§ 7. In the case of *Attorney-General v. Forbes*,⁴ Lord Cottenham remarked, “It was broadly asserted, that an applica-

¹ 2 Story, Eq. §§ 920-924a, pp. 232-236.

² *Cowder v. Tinckler*, 19 Ves. 617.

³ Per Hepburn, J., *Com. v. Rush*, 14 Penn. 195.

⁴ 2 My. & Cr. 133.

tion to this court to prevent a nuisance to a public road, was never heard of. A little research, however, would have found many such instances. Many cases might have been produced in which the court has interfered to prevent nuisances to public rivers and to public harbors. Those commissioners possess a jurisdiction founded on acts of Parliament, and they have a right, within the due limits of their authority, to do all necessary acts in the execution of their functions. Nevertheless, if they so execute what they conceive to be their duty, as to create or occasion a public nuisance, this court has an undoubted right to interpose."

§ 8. In another case, it is said: "It does not follow because a thing is a nuisance to several individuals, that, therefore, it is a public nuisance. One may illustrate that very simply by supposing the case of a man building up a wall which has the effect of darkening the ancient lights of half a dozen different dwelling-houses. It does not follow, that, therefore, it is a public nuisance which can be indicted, or for which the attorney-general can file an information in this court." ¹

§ 9. "To constitute a public nuisance, the thing must be such as, in its nature, or its consequence, is a nuisance — an injury or a damage to all persons who come within the sphere of its operation, though it may be so in a greater degree to some than it is to others. For example, take the case of the operations of a manufactory, in the course of which operations volumes of noxious smoke or of poisonous effluvia are emitted. To all persons who are at all within the reach of those operations it is more or less objectionable, more or less a nuisance in the popular sense of the term. It is true that, to those who are nearer to it, it may be a greater nuisance than it is to those who are more remote; but still, to all who are at all within the reach of it, it is more or less a nuisance. Take another ordinary case — the stopping of the king's highway. This is a nuisance to all who may have occasion to travel that highway. It may be a much greater nuisance to a person who has to travel the road every day of his life, than it is to

¹ Per V. Chanc., *Soltan v. De Held*, 2 Sim. N. S. 144.

a person who has to travel it only once a year, or once in five years. If, however, the thing complained of is such that it is a great nuisance to those who are more immediately within the sphere of its operations, but is no nuisance or inconvenience, or is even advantageous or pleasurable to those who are more removed from it, there, I conceive, it does not come within the meaning of the term public nuisance. The case before me is a case in point. A peal of bells may be, and no doubt is, an extreme nuisance, and, perhaps, an intolerable nuisance to a person who lives within a very few feet or yards of them; but to a person who lives at a distance from them, although he is within the reach of their sound, so far from its being a nuisance or an inconvenience, it may be a positive pleasure.”¹

§ 10. Motion for an injunction to stay the building of a house in which to inoculate for the small-pox. The chancellor intimated that the attorney-general could at his discretion file an information as for a public nuisance, but, as it had not been settled that the house would be a nuisance, the injunction was denied.²

§ 11. Information on the relation of the Scotch Hospital, to enjoin the obstruction and darkening of the ancient lights of the hospital. The injunction having been granted, a dissolution was moved, but the jurisdiction was held undoubted, though an indictment would also lie.³

§ 12. It is held in recent American cases, that chancery may grant an injunction against an act threatened, which, if committed, would be punishable under the criminal laws as a nuisance.⁴ Where the complainant shows that acts about to be done by the defendant, amounting to a public nuisance, will also cause special damage to himself;⁵ (a) as, if they will

¹ Per V. Chanc., *Soltan v. De Held*, 2 Sim. N. S. 143.

² *Baines v. Baker*, Amb. 158; 3 Atk. 750.

³ *Atty.-Gen. v. Nichol*, 16 Ves. 338.

⁴ *The People v. St. Louis*, 5 Gilm. 351.

⁵ *Walker v. Shepardson*, 2 Wis. 384; *Mississippi, &c. v. Ward*, 2 Black, 485; *Zabriskie v. Jersey, &c.*, 2 Beasl. 314.

(a) A very recent case arose before the Massachusetts Supreme Court, August 8, 1868; Judge Gray. *Hewes v. Burdett*. This was a bill in equity

produce extraordinary injury to his property, irreparable in damages, or without a multitude of suits.¹ So chancery will restrain a party from doing an act injurious to an individual, or which may be prejudicial as a public nuisance, pending judicial proceedings before those tribunals, by which the authority to do the act, or its lawfulness, is to be determined.²

§ 12 a. A bill in equity, for the abatement of a nuisance to a highway, cannot be maintained by one whose land does not abut thereon, and who is only injured, in common with others, by being deprived of the use of the highway, although the degree of injury exceeds that suffered by others.³

§ 12 b. Where a private nuisance is itself shown to produce a definite amount of injury; an injunction against it may be maintained, although other persons than the defendant are committing nuisances of the same kind, and though the plaintiff has bought out such parties, who had acquired rights against him.⁴

§ 12 c. A nuisance injurious to individual inhabitants of a town cannot be enjoined upon a bill brought by the town. And to sustain such bill for an injury to town property, the town, like an individual owner of property, must allege a special injury, not similarly affecting the public at large.⁵

¹ *Parrish v. Stephens*, 1 Oreg. 73.

² *Williamson v. Carnan*, 1 Gill & J. 184.

³ *Hartshorn v. South, &c.*, 3 Allen, 501.

⁴ *Crossley v. Lightowler*, Law Rep. (Eng.) Eq., March, 1867, p. 277; acc. *St. Helen's v. Tipping*, 11 H. L. C. 642.

⁵ *Dover v. Portsmouth, &c.*, 17 N. H. 200.

filed in Essex County, for an injunction. The defendants are owners of estates on Washington Street, in Haverhill, on opposite sides of Little River, a small stream running into the Merrimack, under a stone bridge under Washington Street. They are constructing a wooden building over the river, between their brick blocks, and the complainants, owners of estates further up the stream, seek to enjoin them on the ground that the structure will interfere with navigation. The complainants moved for a preliminary injunction, but the respondents having filed answers, the case was heard on the merits. After hearing the complainants' case stated, the court ruled that assuming the stream to be navigable, the complainants showed no special injury, and the only remedy was by indictment. He accordingly ordered the bill to be dismissed.

§ 13. In one of the cases already cited it is held, that one specially injured by a public nuisance may enjoin it, without making the attorney-general party to the bill.¹ And, in another case, it is said, "In informations and proceedings for the purpose of preventing public nuisances, the ordinary course is for the attorney-general to take it on himself to sue, as representing the public; but it is equally certain that individuals, who conceive themselves aggrieved, may come forward and ask the assistance of the court to prevent a public nuisance from which they have individually sustained damage."²

§ 14. We shall hereafter (Chap. XXVI.) consider the remedy of injunction, as applied specially to *railroads*. In the present connection, it may be remarked that a steam railroad in a city is not necessarily a nuisance, nor subject to injunction as such.³ (a)

§ 14 a. The liberal extent to which equity will interfere in enjoining a nuisance is illustrated in a very recent English case.

§ 14 b. A sold land to persons described in the deeds as copper-smelters and copartners, and as purchasing for partnership purposes. The purchasers, between the purchase and

¹ *Soltan v. De Held*, 2 Sim. N. S. 132. ² *New Albany, &c. v. O'Daily*, 12 Ind. 551.

³ Per Lord Cottenham, Atty.-Gen. v. *Forbes*, 2 My. & Cr. 131.

(a) In deciding the same point, the following remarks were made by a learned judge in New York, which, for their rhetorical animation and vivid metaphor, may be quoted as a happy departure from the ordinary tameness and dryness of judicial language: "To protest against this power of adaptation, inherent in the common law, to cases as they arise in our onward progress, is to restrain and impede, not develop and improve. It would be quite as wise to insist that the maritime law, which was sufficient to regulate the commerce of the world when a Roman galley swept timidly and cautiously along the shore, and was deemed hopelessly lost in a starless night, shall now constitute our entire code, when every ocean is whitened with our canvas, every sea 'vexed with our fisheries,' and the keels of our adventurous navigators plough as well the regions of equatorial heat as of eternal frost, visit all climes, and exact tribute from all lands." Per Bacon, J., *Williams v. N. Y. Central, &c.*, 18 Barb. 248.

conveyance, nearly finished smelting works upon the lands. A afterwards sold neighboring land to the plaintiff, having full notice of such works, and, according to some evidence in the case, obtaining a reduction of price on this account. Having recovered a judgment at law for the nuisance, with £360 damages, he filed a bill for injunction. Held, the plaintiff was entitled to an interlocutory injunction.¹ And in another late case it is said: "In any case where a plaintiff could obtain substantial damages at law, he is entitled to an injunction — whether it be smoke, smell, noise, vapor, or water, or any other gas or fluid. Until that time (twenty years) has elapsed, the owner of the adjoining or neighboring tenement, whether he has or has not previously occupied it, in other words, whether he comes to the nuisance or the nuisance comes to him, retains his right to have the air that passes over his land pure and unpolluted, and the soil and produce of it uninjured by the passage of gases, by the deposit of deleterious substances, or by the flow of water. That the spot from whence the nuisance proceeded was a fit, proper, and convenient spot for carrying on the business which produced the nuisance, is no excuse."²

§ 14 c. But, in a recent case in Vermont, the plaintiff having bought land of the defendant, and built a house thereon with notice of the defendant's intention to erect a barn on land adjoining; held, an injunction could not be granted, against the erection of such barn. It would be an abridgment in *equity* of the defendant's *lawful* right.³

§ 14 d. Lapse of time is sometimes set up as a bar to an injunction. Upon this point it is very recently held, that abandonment of a party's rights, which he claims to be infringed by the nuisance, for less than twenty years, cannot be relied upon as a positive defence, but presents a question to be decided by circumstances. A strong circumstance in favor of abandonment, is the lying by and permitting others to incur

¹ *Tipping v. St. Helen's, &c.*, Law Rep. (Eng.) Eq., January, 1866, p. 65. ² *v. Lambert*, Law Rep. (Eng.) Eq., April, 1867, p. 413.

³ Per Lord Romilly, M. R., *Crump v. Curtis v. Winslow*, 38 Verm. 690.

expense in preparing to do that, which, if uninterruptedly continued for twenty years, would destroy the easement. Actual disuse for twenty years, during which adverse rights are acquired, destroys the easement.¹

§ 14 e. Where a nuisance is *continued*, a previous action at law is not necessary to an injunction, unless there is a question of title, or the right is doubtful; and a vendee may enjoin, though the nuisance was previous to his purchase.² Sir J. L. Knight Bruce remarks, in a recent case: "A judgment at law has been obtained by the plaintiff for a nuisance affecting his real estate, and substantial damages have been given. It is almost of course, that a court of equity should grant an injunction to prevent the continuance of the nuisance."³

§ 15. The remedy of injunction does not supersede that of *abatement*. It is said, in a case in Massachusetts, "The plaintiffs' right being fully established, they are entitled not only to the abatement of the nuisance, but to a perpetual injunction to prevent its renewal, and thereby to prevent multiplicity of suits and oppressive litigation; especially as the defendants have undertaken to maintain their supposed right by force, whereby the plaintiffs have been for a long time disturbed in the enjoyment of their just right of property."⁴

¹ Crossley v. Lihtowler, Law Rep. (Eng.) Eq., March, 1867, p. 277; acc. Stokes v. Singers, 8 E. & B. 31 (Eng. C. L. R. vol. 92).

² Hayden v. Tucker, 37 Mis. 214.

³ Tipping v. St. Helen's, &c., Law Rep. (Eng.) Eq., January, 1866, p. 68.

⁴ Per Wilde, J., Stevens v. Stevens, 11 Met. 257.

CHAPTER X.

TRESPASS.

1. General rule.
3. Irreparable injury.
4. Dissolving of injunction.

§ 1. AN injunction will not be granted to restrain a *trespass*, (a) unless the trespasser is insolvent, or the injury irreparable, and destructive to the plaintiff's estate — to its very nature and substance ; and such as calls for immediate relief.¹ At least until the right is determined.² There must be something particular or special in the case, for which a court of law cannot afford adequate redress, and for which, either from difficulty of proof or some other cause, the party cannot obtain adequate satisfaction in the ordinary course of law.³ “ Lord Eldon said that there was no instance of an injunction in trespass, until a case before Lord Thurlow, relative to a mine (Fleming's case), and which was a case approaching very nearly to waste (the defendant having worked from his own land into the coal-mine of the plaintiff), and where there was no dispute about the right. (The case rested upon the principle of irremediable mischief to the mine.) Lord Thurlow had great difficulty as to injunction for trespass ; and though

¹ *James v. Dixon*, 20 Mis. 79 ; *Foster*, 6 Eng. 304 ; *Wilson v. Hughell*, 1 Morr. 461 ; *Catching v. Terrell*, 10 Geo. 576 ; *Shipley v. Ritter*, 7 Md. 408 ; 5 Geo. 576 ; 26 Miss. 84 ; *Centreville, &c. v. Barnett*, 2 Cart. 536 ; *Brooks v. Diaz*, 35 Ala. 599. (See pp. 320, 329.)

² *Schurmeier v. St. Paul, &c.*, 8 Min. 113 ; *Whitman v. St. Paul, &c.*, Ib. 116.

³ *Bethune v. Wilkins*, 8 Geo. 118 ; *Anthony v. Brooks*, 5 Geo. 576 ; 10 Geo. 576 ; *The Justices, &c. v. The Griffin, &c.*, 11 Geo. 246 ; 26 Miss. 84.

(a) More especially if without color of right. *Sutherland v. Maschop*, 2 Stockt. 57. The power to restrain any merely personal tort is doubted. *Kneeder v. Lane*, 3 Grant, 523. Both the threat and intent of committing a trespass are held insufficient. *Tevie v. Ellis*, 25 Cal. 515.

Lord Eldon thought it surprising that the jurisdiction by injunction was taken so freely in waste, and not in trespass, yet he proceeded with the utmost caution and diffidence, and only allowed the writ in solitary cases of a special nature, and where irreparable damage might be the consequence, if the act continued. It has also been allowed in cases where the trespass had grown into a nuisance, or where the principle of multiplicity of suits among numerous claimants was applicable.”¹ (a) So it is said, in a very recent case, “The interference of a court of equity by injunction, in a case of trespass to land, and where an action at law will lie, is of modern origin, and an exercise of power to be justified only in a case of great and irreparable injury. Doubtless, too, the petitioner who invokes it, in conformity with principle and precedent, should show at least a strong *prima facie* case of right.”² But the court may grant an injunction, if the trespass should continue so long as to become a nuisance or a constant grievance.³ Or in cases of repeated acts and trespasses.⁴ Or in case of “one of those simple and summary acts which can be so immediately done, that it is not possible to prevent it while the right is being tried.”⁵ Though the fact that a trespasser is insolvent will not give chancery jurisdiction to enjoin his acts, where the other circumstances of the case preclude it.⁶ Thus an injunction may be had against a trespass upon land, which will destroy its substance so that it cannot be replaced.⁷ So where, in asserting a public right of way by dedication, one repeatedly tore down fences on the land of another; as the acts, if

¹ *Stevens v. Beekman*, 1 John. Ch. 319; Will. Eq. 382.

² *Per Butler, J., Falls, &c. v. Tibbetts*, 31 Conn. 168.

³ *Whitfield v. Rogers*, 26 Miss. 48; 7 Md. 408; *Moore v. Ferrell*, 1 Kelly, 7.

⁴ *Schetz's, &c.*, 35 Penn. 88.

⁵ *Sir W. Page Wood, Law Rep. (Eng.) Eq.*, July, 1867, p. 178.

⁶ *Centreville, &c. v. Barnett*, 2 Cart. 536.

⁷ *More v. Massini*, 10 Min. 590. (See pp. 319, 329.)

(a) “On the same ground, the injunction is granted against the taking of stones of peculiar make, or stones from a quarry. The mischief reaches the very substance and value of the estate. The practice is now more liberal. For the purpose of quieting a possession, or preventing a multiplicity of actions, or where the nature of the inheritance is in jeopardy, or irreparable mischief is threatened, the court will interfere by injunction, even against a person acting under a claim of right. When the right of a party is doubtful, the court will not grant an injunction, until the right is established at law.” Will. Eq. 382.

allowed, might furnish ground for such claim.¹ And a mandatory injunction was granted, where a man had placed a tile upon his neighbor's chimney-pot.² And in a bill to enjoin a trespass, and also for specific performance, if the answer disproves the equity as to the agreement, but admits the trespass, the court will not dissolve the injunction.³

§ 2. The plaintiff complained, that the defendant was accustomed to land his steamboat at a dock of great value belonging to the plaintiff, pretending that the dock was public; but, as no serious damage was to be apprehended from the continuance of the act, the court refused to grant an injunction *in limine*.⁴ So also to restrain a stranger from taking rails from the owner's land, and for an account, &c.⁵ So for cutting and carrying away timber, however wilful, an injunction will not be granted.⁶ So, although damages are recoverable from one who, in building a house, has inserted the ends of the joists into his neighbor's wall without license; an injunction to remove the joists will not be granted, unless special facts are shown requiring it.⁷ Nor for placing earth or other materials on another's land; the proper remedy is an action for trespass.⁸ Nor for throwing down fences, and letting in cattle upon a growing crop; the injury being susceptible of perfect pecuniary compensation.⁹ Nor for the erection of a trestle-work for a railroad upon the plaintiff's land.¹⁰ Nor for a tenant illegally dispossessed by a sheriff, under a sale made by him.¹¹ So a bill for injunction alleged, that the defendant, without authority, and against the wishes of the justices in whom the title was vested, seized on a public square, and was proceeding to erect a building for a court-house, insufficient for that purpose, and that injury would be thereby caused, either irreparable or to be repaired only after great delay and at great expense. Injunction refused.¹² So the plaintiffs as-

¹ *Carpenter v. Gwynn*, 35 Barb. 395.

² *Hervey v. Smith*, 1 K. & J. 389.

³ *The Justices, &c. v. The Griffin, &c.*, 11 Geo. 246.

⁴ *N. Y. Printing, &c. v. Fitch*, 1 Paige, 97.

⁵ *Cooper v. Hamilton*, 8 Blackf. 377.

⁶ *Cowles v. Shaw*, 2 Clarke, 496.

⁷ *Rankin v. Charless*, 19 Mis. 490.

⁸ *Mulvany v. Kennedy*, 26 Penn. 44.

⁹ *Catching v. Terrell*, 10 Geo. 576.

¹⁰ *Schurmeier v. St. Paul, &c.*, 8 Min. 113; *Whitman v. St. Paul, &c.*, Ib. 116.

¹¹ *Sullivan v. Hearnden*, 11 Geo. 294.

¹² *Justices v. Cosby*, 5 Jones, Eq. 254.

serted their right to certain mining claims, and complained of the defendant's unlawful intrusion therein ; and an injunction was granted restraining certain acts of trespass done and threatened. Held, the suit was substantially for trespass ; that the injunction was in aid of the suit, and could not be continued after a verdict had been rendered for the defendants.¹

§ 3. A prayer for an injunction, to restrain a trespass which does not appear to cause irreparable injury, is fatally defective.² The bill must allege peculiar circumstances to show that the injury is irreparable, and the common law remedy insufficient.³ And whether the damage is irreparable or not, is a conclusion of law, which the court draws from the facts and circumstances in regard to the trespass, as set forth in the bill.⁴ (a)

§ 4. It is held that an injunction to restrain a trespass will be dissolved, on the coming in of the answer, denying the right of the complainant, unless it appears that there is a suit at law pending to try the title.⁵

¹ Brennan v. Gaston, 17 Cal. 372.

² Bolster v. Catterlin, 10 Ind. 117.

³ Hatcher v. Hampton, 7 Geo. 49.

⁴ The Justices, &c. v. The Griffin, &c., 11 Geo. 246.

⁵ Stewart v. Chew, 3 Bland, 440.

(a) So an injunction ought not to be granted in aid of an action of trespass, unless it appear that the injury will be irreparable and cannot be compensated in damages. It is not sufficient that the affidavit alleges irreparable injury ; it must be shown to the court how and why it would be so ; especially where no action has ever settled the plaintiff's rights. Waldron v. Marsh, 5 Cal. 119.

CHAPTER XI.

WASTE.

§ 1. WASTE is a familiar ground for injunction ; and perhaps an injury better entitled to be termed *irremediable* than any other.¹

§ 2. The history of the common law in reference to waste is thus stated by Lord Chief Justice Eyre in *Jefferson v. Durham*,² termed by Judge Story “a celebrated case :”³ “At common law the proceeding in waste was by writ of prohibition from the Court of Chancery, which was considered as the foundation of a suit between the party suffering by the waste, and the party committing it. If that writ was obeyed, the ends of justice were answered. But, if that was not obeyed, and an *alias* and *pluries* produced no effect, then came the original writ of attachment out of chancery, returnable in a court of common law, which was considered as the original writ of the court. The form of that writ shows the nature of it. It was the same original writ of attachment which was and is the foundation of all proceedings in prohibition, and of many other proceedings in this court. It has been said, and truly so, I think, so far as can be collected from the text writers, that, at the common law, this proceeding lay only against tenant in dower, tenant by the curtesy, and guardian in chivalry. It was extended by different statutes to farmers, &c. That, which these statutes gave by way of remedy, was not so properly the introduction of a new law, as the extension of an old one to a new description of persons. The first act, which introduced anything substantially new, was that which gave a writ of waste or estrepement, pending the suit.

¹ See *Walker v. Sherman*, 20 Wend. 638 ; *Relyea v. Beaver*, 34 Barb. 547.

² 1 B. & P. 120.

³ 2 Story, Eq. 223, § 909.

But, except for the purpose of staying proceedings pending a suit, there is no intimation in any of our text writers, that any prohibition could issue from those courts." Judge Story remarks, however, that "courts of equity have by no means limited themselves to an interference in cases of this sort (*estrepement* in real actions). They have, indeed, often interfered in restraining waste by persons having limited interests in property, on the mere ground of the common law rights of the parties, and the difficulty of attaining the immediate preservation of the property from destruction or irreparable injury, by the process of the common law. But they have also extended this statutory relief to cases, where the remedies provided in the courts of common law cannot be made to apply; and where the titles of the parties are purely of an equitable nature."¹ So it is remarked, that the interference of equity in case of waste "is a wholesome jurisdiction, to be liberally exercised; the prevention of irreparable injury, and depends on much latitude of discretion in the court."² And that "the jurisdiction of English equity in cases of waste began with the injunction *pendente lite*, but has long since extended itself to cases where no action at law was pending, but where it was needed for the protection of trust estates and estates in reversion and remainder, and has now become one of the well-defined branches of equity jurisprudence."³ So also, that an injunction to stay waste has become almost a matter of course.⁴ (a)

¹ 2 Story, Eq. 227, § 912.

³ Per Woodward, J., *Denny v. Brun-*

² *Kane v. Vanderburgh*, 1 John. Ch. 11.

son, 29 Penn. 384.

⁴ *Smith v. City, &c.*, 19 Geo. 89.

(a) The following remarks illustrate the past and present state of the law upon this subject: "Whether the law — provides for the protection of property in litigation — as completely or effectually as in the present state and habits of society is sufficient for general convenience, — whether, since the extensive changes which, within the last few years, the Legislature has introduced, the writ of *estrepement* — is a remedy that remains in existence or can be obtained — it is not necessary for me to intimate any opinion. But I am not aware of any authority — that the Court of Chancery — has jurisdiction to interfere for the purpose of giving relief or protection in all cases such as those, or analogous to those, or within the same reason and principle as these (those), in which the writ of *estrepement* lies or did lie. I am not, however, convinced that, where a man is in possession — of an estate by a title — adverse to that of another, without any privity, such a state of things, if the party in possession, by his answer, whether

§ 3. Conformably with these views, "equity will, in many cases, restrain waste, though the lease contain the clause *without impeachment of waste*, which takes away the remedy at law; as where this power is exercised in an unreasonable manner, and against conscience."¹ So an intermediate tenant for life may enjoin the tenant for years against waste.² So where there is a tenant for life subject to waste, remainder for life dispunishable for waste, remainder in fee; the court will not suffer an agreement between the two tenants for life to commit waste to take place against the remainder-man, before the time when the term of the second tenant for life commences.³ And a bill in equity against waste lies for any remainder-man who is injured; though an action at law can be maintained only by the owner of the first estate of inheritance.⁴ So equity will by injunction protect a mortgagee of personal as well as real property, against waste or destruction by the mortgagor in possession, whether a default have been made or not.⁵ (See Chap. XXVIII.) So, in a proper case, the assignee of a tenant for life, without impeachment for waste, may be restrained from committing waste; though he may exercise the same rights as his assignor might have exercised.⁶ So A granted lands to the use of trustees for a term *sans* waste, and, subject thereto, to the use of herself for life *sans* waste, with remainder to the use of B for life *sans* waste, with remainder over, with remainder to B in fee. The trusts of the term were, by cutting and selling timber, or by demising, mortgaging, and selling the premises, to raise three sums, the first of which was to be raised forthwith and paid to A. A died before any money had been raised. Six years after the date of the grant, B, as tenant for life in possession, advertised

¹ Kane v. Vanderburgh, 1 John. Ch. 11.

² Roswell's case, 1 Rolle's Abr. 377.

³ Robinson v. Litton, 3 Atk. 210.

⁴ Dennett v. Dennett, 43 N. H. 503.

⁵ Parsons v. Hughes, 12 Md. 1.

⁶ Clement v. Wheeler, 5 Fost. 361.

truly or untruly, swears his title to be just and valid, or that of his adversary to be unjust and invalid, does of necessity prevent a court of equity from interfering (before any judgment at law or decree in equity) to restrain the party in possession from stripping the estate of its timber, pulling down the mansion-house upon it, or other such acts.—Chancery does not treat questions of destructive damage—now exactly as it did forty or fifty years back." Per V. Chanc., Haigh v. Jaggar, 2 Coll. (33 Eng. Cha.) 234.

a sale of timber. Held, on a bill by the trustees for an injunction against B, that by the terms of the grant the trustees had, as to the mode of raising the moneys, a discretion with which the court could not interfere, and therefore a right to enter and cut timber, to which right B's estate, though *sans* waste, was subordinate; and B was restrained from cutting or selling the timber while the moneys remained to be raised.¹ And it is held that an injunction lies against waste, though the plaintiff is in possession.²

§ 3 a. But in order to restrain waste of city property belonging to a sinking fund, a creditor of the city must show that he is likely thereby to lose his debt.³ So one not having the legal title to land cannot maintain a suit to recover the land and damages for waste committed upon it; and therefore his prayer, in such suit, for a temporary injunction against the waste, will be denied.⁴

§ 4. Equity will grant an injunction, to prevent the destruction of timber, ornamental, or fruit trees, whether such trees were planted for shade and ornament, or grew naturally in the position which renders them thus valuable to the owner. And the jurisdiction does not depend on their value as wood or timber, but on their location as part of an estate, rendering it more valuable by the use to which they are or may be devoted.⁵ So acts which would result in the destruction of all the timber on a man's home plantation, where wood and timber are necessary to the enjoyment of the property in that character, are sufficient to authorize an injunction.⁶ So where an equity in real estate is attached, equity will restrain the cutting and removing of wood to the injury of the security.⁷ So, on the ground of irreparable damage, and if done without authority of law, digging deep holes, and planting therein large stone pillars or abutments, digging and carrying away large banks of valuable clay, and constructing an aqueduct by

¹ *Kekewich v. Marker*, 5 Eng. Law & Eq. 129.

² *More v. Massini*, 10 Min. 590.

³ *Roosevelt v. Draper*, 23 N. Y. (9 Smith) 318.

⁴ *Gillett v. Treganza*, 13 Wis. 472.

⁵ *Natoma, &c. v. Clarkin*, 14 Cal. 544; *Shipley v. Ritter*, 7 Md. 408.

⁶ *Davis v. Reed*, 14 Md. 152.

⁷ *Moulton v. Stowell*, 16 N. H. 221.

ditches and embankments through, and thus permanently dividing, the complainant's land.¹ So insolvent persons, who threaten to enter upon land owned and possessed by the complainant, and to dig thereon, whereby the streams and springs would be greatly injured, may be enjoined.² But an injunction will not be granted against cutting trees merely alleged to be ornamental. It must appear that they were planted or left standing for ornament.³ Nor is it a sufficient averment, that they "contribute to ornament."⁴

§ 5. But it was held in an early American case, though somewhat too broadly in the light of subsequent decisions, that an injunction to stay waste is never granted against a defendant in possession, *and claiming by title adverse to that of the plaintiff*.⁵ And Lord Eldon remarked: "It was always surprising to me, that the jurisdiction by injunction was taken so freely in waste and not in trespass; for there is a writ at common law after action to restrain waste. But a trespass after one action may be repeated."⁶ (a) And he decided in

¹ Reddall v. Bryan, 14 Md. 444.

² Bensley v. Mountain, &c., 13 Cal. 306.

³ Coffin v. Coffin, Jac. 70; Marquis, &c. v. Sandys, 6 Ves. 110. See Lord Tamworth v. Lord Ferris, 6 Ves. 419; Day v. Merry, 16 Ves. 375; Williams v. McNamara, 8 Ib. 70; Newdegate v. Newdegate, 1 Sim. 131.

⁴ Williams v. McNamara, 8 Ves. 70.

⁵ Per Kent, Chanc., Lansing v. North, &c., 7 John. Ch. 164; Pillsworth v. Hopton, 6 Ves. 51; Storm v. Mann, 4 John. Ch. 21.

⁶ Per Lord Eldon, Smith v. Collyer, 8 Ves. 90.

(a) In an earlier case, *Hanson v. Gardiner* (7 Ves. 306), Lord Eldon remarks upon the caution with which equity had interfered by injunction in cases of trespass or even of waste, citing the authority of Hardwicke, Thurlow, Buller, and Kenyon. And Lord Hardwicke remarks: "There is no such thing as an injunction until hearing being of course. There cannot be a stronger instance — than the case of waste. After answer come in and affidavits read — the court will, according to their discretion, continue the injunction until hearing or not, and yet the plaintiff may go on with the cause, and finally have a decree to stay waste." *Potter v. Chapman*, 1 Ambl. 98.

Plaintiff, being a termor at ground-rent, brought a bill against his lessee to stay waste, and moved at the Rolls for an injunction, *but was denied*; and it was now moved again before *Lord Chancellor*, and granted. *Farrant v. Lee*, 1 Ambl. 105.

Where the alleged grievance was the removal of wood, the plaintiff relied on possession under an agreement with the husband of one of tenants in common "with the consent and approbation of his wife." The defendants rely on possession under a deed from both tenants, executed after death of the husband. The plaintiff's possession was held not adverse, and an injunction refused. *Dean v. Brown*, 23 Md. 17.

the same case, that no injunction lies against waste in case of a disputed title between heir and devisee.¹ And it is held that a bill for injunction to stay destructive waste cannot be sustained against one in exclusive possession, claiming colorably the absolute estate, where no action at law has been brought and none contemplated.² And that a party is not to be restrained from cutting timber on land in his possession, when the weight of the evidence is rather in favor of his right and title.³ So A, claiming title to a cedar swamp, complained that B had cut a part of the cedar, and moved it to lands of a third person, where it had been sold at auction ; and he prayed an injunction against B and the bidders, restraining them from carrying it away, and B from farther cutting. The injunction was allowed. After answer of B, claiming title to the swamp, and proof that B was able to respond, the court dissolved the injunction.⁴ But it has been held in a late case, that chancery will interpose to prevent the destruction of the inheritance, even where both title and possession are in dispute.⁵ So it is held, that, where the right is doubtful, the court should direct a trial, and, in the mean time, if there be any danger of irreparable mischief, a temporary injunction should be ordered. Thus in an action to enjoin removing timber from land claimed by the plaintiff; title in the plaintiff, unlawful possession by force by the defendants, and the pendency of a suit by the plaintiff, for the forcible entry and detainer, were averred. The defendants objected, that they were in possession and that no action to try the title had been brought. The plaintiff did not ask to be restored to possession. Held, he was entitled to the relief sought.⁶ And the following remarks of the court in New York show a much more liberal adoption of the remedy than was sanctioned by the earlier cases. "The defendant insists that as he is in possession, claiming adversely to the plaintiff, and as the title is in dispute, an injunction bill to stay waste cannot be sustained. *Storms* (Storm) v. *Mann*⁷ is cited in support of this proposition. In that case, the defendant had been

¹ *Smith v. Collyer*, 8 Ves. 89.

² *Bogey v. Shute*, 4 Jones, Eq. 174.

³ *Smith v. Wilson*, 10 Cal. 528.

⁴ *Brown v. Folwell*, 3 Halst. Ch. 593.

⁵ *Cornelius v. Post*, 1 Stockt. 196.

⁶ *Hicks v. Michael*, 15 Cal. 107.

⁷ 4 John. Ch. 21.

in possession of the premises a long time, and was in possession at the time of the filing of the bill; the plaintiff had commenced an ejectment at law, and the defendant had joined issue with him on the question of title, and the action was pending undetermined. But in the bill in that case there was no allegation of the insolvency of the defendant, or that the waste which he was committing would be an irreparable injury to the premises.”¹

§ 5 a. Lord Eldon said: “I never would grant an injunction upon an affidavit, stating, that the deponent verily believes the defendant is about to cut timber.”² So an injunction was refused where the bill stated that the defendants had commenced cutting, and that the complainants “believed” that the defendants had threatened and then intended to cut down and carry away “large quantities of the wood,” &c.³

§ 5 b. On account of the great expense incident to *mining*, an injunction will not be readily granted in such case; nor in case of *laches*.⁴ And, in the case of *Haigh v. Jagger*,⁵ the facts were as follows: “Both parties claimed in effect under the same lessor or grantor; the question being, whether a certain lease or grant had expired or been abandoned; the plaintiffs alleging that it had. The defendants had been working the coal in question since August, 1844, but the bill was not filed till about a year afterwards. An action had been commenced by the plaintiffs and discontinued. Under these circumstances, an injunction was refused. The vice-chancellor remarked: “The defendants, who claim a right to do what they are doing, are, it is true, by working the coal, taking the very substance of the property, which may in a sense be perhaps called in this case, and might in others most certainly be, waste or destruction; but, on the other hand, it is the only mode in which the property in question can be usefully enjoyed or made available, and may, therefore, in a sense

¹ Per Paige, J., *Spear v. Cutter*, 5 Barb. 487.

² *Etches v. Lance*, 7 Ves. 416.

³ *Cornelius v. Post*, 1 Stockt. 196.

⁴ *Grey v. Northumberland*, 17 Ves. 281; *Birmingham, &c. v. Lloyd*, 18 Ib. 515.

⁵ 2 Coll. 238; 33 Eng. Cha. (See pp. 319, 320.)

perhaps be deemed not more than taking the ordinary use of the thing in dispute ; nor is an unskilful or unworkmanlike working established against the defendants, nor are they said to be insolvent." And after several months' occupation of a mining claim, and considerable expenditures upon it, the work will not be enjoined except for clear and strong reasons.¹

§ 5 c. But where, in an action for trespass upon a mining claim, praying for a perpetual injunction, in which the main issue raised was the title to the land, the jury found a verdict for the plaintiffs, with one dollar damages ; and the court rendered judgment accordingly, but refused to grant the injunction : held, upon appeal, the verdict entitled the plaintiffs to the injunction.²

§ 6. A bill alleging that the trespasser is about to commit irreparable injury by boxing and working turpentine trees, and by cutting timber and making staves on land, fit only to be cultivated for these products, without an averment of the defendant's insolvency, will be dismissed on motion.³

§ 7. An injunction will not lie to prevent the commission or repetition of a trespass, in entering and cutting down timber on land of which the plaintiff is in possession as owner, he having an adequate remedy at law for the trespass, and nothing appearing in the case so special or peculiar as to call for that particular relief. But where the complainant is a married woman, and the lands are her separate estate, by deed appointing her husband trustee, who, contrary to her wishes and to his duty, enters into an agreement for the submission to arbitration of an unfounded claim by one of the respondents to cut timber on the land ; and an award is made in favor of the claimant : upon a bill alleging that the respondents, armed with the award, are cutting the timber, and assert the right to do so, "and will continue to do so, unless restrained" by the order of the court, an injunction will be granted.⁴

§ 8. An injunction to stay waste, pending an ejectment suit,

¹ *Real, &c. v. Pond, &c.*, 23 Cal. 82.

² *McLaughlin v. Kelly*, 22 Cal. 211.

³ *Gause v. Perkins*, 3 Jones, Eq. 177.

⁴ *Thomas v. James*, 32 Ala. 723.

will not be continued, where the defendant is in possession claiming adversely, especially if there has been needless delay in the prosecution of the ejectment.¹

§ 9. "In cases of waste, the account goes merely upon the injunction."² "The right to an account for waste already committed is incidental to the right to file a bill to prevent further waste, though no bill will lie merely for an account for waste done, because the plaintiff has an ample remedy at law."³ So equity may forbid by injunction the removal of what has been obtained by past waste.⁴ So, although equity will not sustain a bill filed solely to prevent removal of timber wrongfully cut, or for an account of past waste, there being a complete remedy at law; yet when the bill is also filed to prevent future waste, to avoid multiplicity of suits, the court will allow an account of and satisfaction for what has been done, and, to prevent irreparable mischief, will enjoin removal of the timber.⁵

§ 10. A party praying for an injunction against a lessee for waste, alleging himself to be a purchaser from the lessor by deed, must exhibit his deed, and prove its execution, in order to obtain an injunction.⁶

§ 11. A bill for a special injunction, to restrain a party in possession, and claiming adversely, from cutting timber, must not only set forth that the threatened injury would be irreparable, but must also state how it would be so, that the court may see clearly that such would be the result.⁷ (a)

¹ *Higgins v. Woodward*, Hopk. 342.

² Per Lord Eldon, *Grierson v. Eyre*, 9 Ves. 346.

³ Per Bell, C. J., *Dennett v. Dennett*, 43 N. H. 503.

⁴ *United States v. Parrott*, 1 McAll. C. C. 271.

⁵ *Spear v. Cutter*, 5 Barb. 486.

⁶ *Loudon v. Warfield*, 5 J. J. Marsh. 196.

⁷ *Thompson v. Williams*, 1 Jones, Eq. 176; *Bogey v. Shute*, 1 Jones, Eq. 180.

(a) A bill being filed for an injunction to restrain waste, pending an action of ejectment brought to try the title, the ejectment being successful, the injunction submitted to, and the defendant having quietly permitted the plaintiff, after a verdict at law, to sell the estate, and not alleging that he intended to take any steps to disturb the verdict at law, and the defendant being a pauper, and having recently changed his solicitor; it was held, that the special circumstances took the case out of the general rule, on a motion to dismiss for want of prosecution. *Pinfold v. Pinfold*, 15 Eng. Law & Eq. 10.

CHAPTER XII.

USURY.

§ 1. USURY is sometimes set up as a ground of injunction.¹ Thus a creditor is not allowed to make it a condition of a loan, that he shall receive a compensation for his services in procuring the money ; and if such compensation is included in the security given for the loan, the court will, on the debtor's paying into court the sum reported to be due by a master, after deducting the sum charged for such services, grant an injunction to stay proceedings upon a mortgage by which the loan is secured.² The court remarks : " This court is always jealous of collateral demands and advantages claimed by a creditor as a *condition* of the loan of money. The actual expenses of the writings ought to be paid ; but to allow the creditor to make it a condition of the loan, that he shall receive a *compensation for his services*, in procuring the money, and to include that compensation in the security, is against sound principle, and tends most manifestly to oppression and usury, if it is not usury in itself." ³

§ 2. In cases of concurrent jurisdiction, a preliminary injunction to restrain a suit at law upon a usurious contract will not be granted, unless the plaintiff shows that he would be deprived of some legal or equitable right, if the adverse party should be permitted to proceed.⁴ Thus the court will not stay a suit at law upon a note not negotiable, for usury, of which the lender is the only witness ; the maker having, under the statute, a complete defence, by examining the plaintiff in the suit.⁵ Nor will an injunction of a judg-

¹ See *Spann v. Sterns*, 18 Tex. 556.

² *Hine v. Handy*, 1 John. Ch. 6.

³ Per Kent, Chanc., *Hine v. Handy*,
1 John. Ch. 6.

⁴ *Mitchell v. Oakley*, 7 Paige, 68.

⁵ *Perrin v. Striker*, 7 Paige, 598.

ment be granted for usury,¹ which the party neglected to set up after notice.²

§ 3. An injunction of a sale under a trust-deed, given as security for a usurious debt, requires a tender of the amount acknowledged to be due.³

¹ *M'Collum v. Prewitt*, 1 Ala. Sel. Cas. 498.

² *Chinn v. Mitchell*, 2 Met. Ky. 92.

³ *Casady v. Bosler*, 11 Iowa, 242.

CHAPTER XIII.

POSSESSION AND REMOVAL.

§ 1. EQUITY sometimes interposes by injunction to give *possession* of property. More especially delivery may be ordered in case of *trust*.¹ It is said, "Courts of equity interfere and effectuate their own decrees in many cases by injunctions, in the nature of a judicial writ or execution for possession of the property in controversy; as, for example, by injunctions to yield up, deliver, quiet, or continue the possession, followed up by a writ of assistance. Injunctions of this sort are older than the time of Lord Bacon, since, in his ordinances, they are treated as a well-known process. Indeed, they have been distinctly traced back to the reign of Elizabeth and Edward the Sixth, and even of Henry the Eighth."² (a)

¹ *Farington v. Parker*, Law Rep. (Eng.) Eq., July, 1867, p. 115. ² 2 Story, Eq. 268, § 959.

(a) Where a complainant obtains an injunction to restrain the sale of property, which remains in his possession, he giving bond and security to have it forthcoming to answer the decree of the court, and the bill is dismissed upon appeal, the defendant cannot obtain possession of the property upon application by petition to the Chancery Court, by virtue of a writ of restitution. He must resort to his remedy upon the injunction bond, or to an original suit to obtain possession. In practice, the writ of restitution appears to be unknown in the Chancery Court. *Starke v. Lewis*, 23 Miss. 151.

An old authority recognizes the jurisdiction of equity for quieting possession after three years. Com. Dig. Chancery, D. 12; Bac. Ordin. Beames, Ch. 15. After a writ of execution of a decree, and an attachment served on the defendant; the plaintiff may have an injunction to deliver possession, and then a writ of assistance, commanding the sheriff to aid in giving possession. *Stribley v. Hawkie*, 3 Atk. 275.

An order had been obtained by the plaintiffs, upon a motion of course for an injunction to deliver possession of an estate, according to a previous decree, with the alleged object of grounding upon the order the *writ of assistance*, to be executed by the sheriff in case of disobedience. It was admitted that this course had not been adopted for about twenty years. *Haguenin v. Basely*, 15 Ves. 180.

In a case between the widow of a father and the representatives of his deceased son, where the latter had intermixed the papers of the former with his own, the

Thus where a court of equity decrees a conveyance, and the defendant refuses to obey the decree, a writ of injunction, to compel delivery of the possession, may be issued, and, if that be not obeyed, an *habere facias possessionem*.¹

§ 1 a. In a case often cited, the plaintiff claimed, as *treasure-trove* upon his manor, an ancient silver altar-piece, having a Greek inscription and dedicated to Hercules, which came into the defendant's hands with notice of his title. The plaintiff brings a bill to enforce his title to the article, and also to prevent the defendant from defacing the altar-piece. Held, from the peculiar nature of the thing, as an article of curiosity, in consequence of which an action at law might afford inadequate compensation, an injunction should be granted.² So, in Pennsylvania, a bill for an injunction was maintained in behalf of a surveyor, who had left in the hands of the defendant, a former pupil, certain plans and surveys of lands and streets, and also furniture and instruments used in the business of surveying. Mr. Justice Bell, in his elaborate opinion, refers to the several English cases where this remedy was applied to restore possession of title-deeds, valuable paintings, an antique silver altar-piece, an ancient horn, the symbol of tenure, heir-looms, and a finely-carved cherry stone. "Such articles as these are commonly esteemed not altogether, or perhaps at all, for their intrinsic value, but as being objects of attach-

¹ *Garretson v. Coale*, 1 Har. & J. 370.

² *Duke, &c. v. Cookson*, 3 P. Wms. 390.

vice-chancellor said, "It was the duty of the son not to allow any intermixture. That is the old principle of the civil law, and it has been always adopted in this court. G. and A. claim to act as the executors of the son; and they admit that they have papers belonging to the estate of the father; and, therefore, they ought, immediately after the son's death, to have handed over those papers to the plaintiff. Then it was said that there has been a difficulty in making out what papers belong to the father; but, though four months have elapsed since the son's death, it does not appear that the defendants have made any attempt to ascertain which belong to the father and which belong to the son. Now the object of the application is in the first place, to prevent (the defendants) from parting with (the papers). There is no objection to granting that part of the application. The next part of the motion is in effect, that the plaintiff may have access to the documents until the court shall make a final order for the delivery of them to her during the progress of the suit." This motion was also granted. *Goodale v. Goodale*, 16 Sim. (39 Eng. Ch. Rep.) 316.

ment or curiosity, and, therefore, not to be measured in damages by a jury who cannot enter into the feelings of the owner; so, too, the impossibility, or even great difficulty of supplying their loss, may put damages out of the question as a medium of redress. But these are not the exclusive reasons why chancery interferes." But also "where, from the nature of the subject, or the immediate object of the parties, no convenient measure of damages can be ascertained, or where nothing could answer the justice of the case but the performance of a contract in specie." The court proceed to justify the jurisdiction upon these grounds, in reference to the plans, surveys, &c., and in regard to the other articles remark: "If the jurisdiction once attaches from the nature of one of the subjects of contest, it may embrace all of them, for equity abhors multiplicity of suits. Where a person is found wrongfully in possession of a farm, over which the court had undoubted power, and also in possession of the stock upon it, at the same time and under the effect of the same wrong, the court will undoubtedly make him account for and deliver back the whole. The surveying instruments and office furniture stand in the same category with the maps, &c., were delivered at the same time, and are withheld by an exertion of the same wrong." The jurisdiction was also maintained upon the grounds of the inadequacy of a writ of replevin, and of trust.¹ So although equity will not seek to enforce a doubtful right by injunction, yet it will thus interpose in favor of one who has had long, undisturbed, and exclusive possession of land under a deed really invalid, but which was recorded, and which the grantee and others holding under him supposed to convey a title, the party disputing such title being a trespasser without color of right.² So a bill alleges that certain buildings were used for medical instruction, and as an infirmary for the sick, by the professors composing the medical faculty of a corporation; and prays, that the defendant shall be restrained from so acting as to interfere with their possession and use for that purpose, and that he be commanded to forbear from the repetition of the acts which impeded the enjoyment of the

¹ McGowin v. Remington, 12 Penn. 56, 61, 62, 63.

² Falls, &c. v. Tibbetts, 31 Conn. 165.

rights, and the discharge of the duties, on the part of the professors. Held, an injunction of this description could not be regarded as going beyond the legitimate office of the process, or as possessing the character of a judicial writ.¹

§ 2. But, on the other hand, it is held that the only ground on which injunctions are granted, against third persons in possession of personal property, and ostensibly its rightful owners, upon an *ex parte* application, is for the protection of the fund or property, when shown to be in danger without this interposition.² Some of the leading cases on the general subject of possession are as follows.

§ 3. In an early English case, the Lady Paines's trustee having contracted to sell her estate to one person, she herself having actually sold it to another, this trustee disturbed the purchaser in his possession; and it was now moved for an injunction to quiet the possession of the purchaser. But it was answered that such a motion never was made to have an injunction to quiet the possession for a defendant, who had no bill in court, and that before the cause was heard. An injunction for quieting the possession is only grantable when the plaintiff has been in possession for the space of three years before the bill exhibited, upon a title yet undetermined, or in case the cause hath been heard, and judgment passed upon the merits of the cause by the court, and therefore the Lord Keeper denied the motion.³ So equity will not enjoin the sailing of a vessel, containing goods sold to an insolvent person, where the right of *stoppage in transitu* still continues. The Lord Chancellor remarked: "If a ship contains a cargo belonging to twenty-four persons, and A B has a right to part of it, am I to stop the ship from sailing with the goods of the other twenty-three? There is no instance, that I recollect, of stopping *in transitu*, by a bill in equity."⁴ So one in actual possession of an exclusive privilege, claiming title, will not be restrained by injunction from its exercise, until the

¹ *Washington, &c. v. Green*, 1 Md. Ch. Dec. 97.

² *Thayer v. Smith*, Harring. Ch. 430. See *Martin v. Broadus*, 1 Freem. Ch. 35.

³ *The Lady Paines's case*, 1 Vern. 156.

⁴ *Goodhart v. Lowe*, 2 Jac. & W. 349-50-51.

establishment of a better, adverse right at law, especially at the suit of a party who merely denies right, without setting up any in himself.¹ In a leading case in New York, the court remarked substantially as follows: "The defendants claim and exercise the right of exclusively navigating the Hudson River, with vessels propelled by fire and steam, under certain acts of the legislature. The defendants, and those from whom they claim to have derived title, have been, ever since the year 1807, in the actual possession and enjoyment of such exclusive privilege. The plaintiffs assert no right peculiar to themselves, but only a right common to every citizen, nor do they allege any actual infringement in their particular case, of that common right. An injunction would be unprecedented. The common right must be first legally established, and the defendants must be first duly ousted of their pretension and possession, by due course of law. The plaintiffs insist that the exclusive right has expired. It is sufficient that the defendants claim such an exclusive privilege, and that they are in the actual possession and enjoyment of it, by color of law."² And in another case in the same State it is held, that, where possession is the principal object of the suit, and would give a very important advantage to either party, it cannot be transferred by an *ex parte* preliminary injunction. The facts were as follows: A bill was filed by the complainants, as members of an association for raising out of the water the British frigate "The Hussar," which during the revolutionary war had sunk in the East River near Morisania, in sixty or seventy feet of water, and was stated in the bill to be abandoned and derelict. The defendants by their answer claimed, that, before the association of the plaintiffs was formed, a similar enterprise had been undertaken by them, of which the plaintiffs had notice. In giving their opinion upon the case, the court remarked: "The right claimed by each of the contending parties, is the right of occupancy. Both parties have prepared means and have taken measures to raise the sunken frigate; neither party has yet effected that object, and neither party has yet obtained any actual or exclusive possession. The whole case stated in

¹ *Lansing v. North, &c.*, 7 John. Ch. 162. ² 7 John. Ch. 164-5.

this bill, is that which would be presented to a court of law, in an action of trespass. The peculiar situation of this sunken vessel affords no ground of equitable jurisdiction. It is not alleged that the defendants are insolvent; that any contract exists between the parties; that there is in the case any fraud, trust, or other ground of equitable jurisdiction; or that there is any impediment to the ordinary remedies of the law. The right is disputed; the possession of either party is very incomplete. To award possession to either party would be to determine the main question of rightful possession, in a summary manner. The writ of injunction would be greatly misapplied, should it be used to transfer the possession from one party to the other, in this case, in which possession must give a most important advantage." The injunction was accordingly dissolved.¹ So the hirer of a house and land, furniture and effects, being in possession, cannot enjoin the levy of an execution thereupon under a judgment against the owner. The court remarked: "The party has a possessory right. If his possession is intruded upon, he has a remedy at law. The right to take in execution is a question of law. Injunctions would be applied for every day, where executions were improperly issued, if the court were to assume a jurisdiction."²

§ 4. The possession of vendees, under a bond for a deed, is a sufficient possession of the vendor to enable him to maintain a bill *quia timet*.³

§ 5. A statute, which provides that "any person having the possession and legal title to land may institute a suit against any other person setting up a claim thereto," &c., does not give courts of equity power to disregard the settled rules of law governing their proceedings; but was intended to authorize a person in possession of land to institute a suit in equity, in a proper case, against one claiming title to the land, though no attempt had been made to disturb the complainant in his possession.⁴

¹ *Deklyn v. Daveis*, 1 Hopk. 135.
Per Sanford, Chanc., Ib. 141, 142, 143.

² *Garstin v. Asplin*, 1 Madd. 90-1.

³ *Thomas v. White*, 2 Ohio (N. S.) 540.

⁴ *Clark v. Drake*, 3 Chand. 253.

§ 6. Equity sometimes interposes by injunction to prevent the unlawful *removal* of property.¹

§ 7. To justify an injunction against the removal of property by a tenant for life, or an order compelling him to give security for its forthcoming, it must be shown that there is danger of such removal beyond the jurisdiction of the court.²

§ 8. Equity has interfered, at the instance of a remainderman in slaves, to prevent the owner of the life estate from removing them out of the State; but not after such removal has taken place — especially before a right of partition has accrued.³

§ 9. Where slaves were taken from the owner for life, under an order of sequestration, to prevent a removal, and were hired out, equity ordered the hires to be paid to such owner.⁴

§ 10. Where an amended bill alleged, that, since the original bill was filed, the defendant had sold three slaves claimed as partnership property, and that the complainant had good cause to believe that he was about to sell or remove beyond the jurisdiction of the court the remaining negroes belonging to the copartnership; and the answer admitted the sale, and did not deny the intention to remove the residue: held, an injunction was proper, and an order made by the commissioner to restrain the defendant from selling or removing, and to compel him to give a bond for the forthcoming of the property to abide the final order of the court.⁵ So, in a bill for an injunction to prevent slaves from being taken out of the State, an allegation that the defendant was about to sell his perishable property, and that it was rumored he was about to remove, and that the plaintiff believed, if he did so, he would carry off the slaves, which he held for life only; was sufficient ground for an injunction, and, not being met by the answer, though it denied the intention of removing, the injunction was continued.⁶

¹ See *Tracey v. Cole*, Mass. S. J. C. Suffolk, August, 1868.

² *Clagon v. Vesey*, 7 Ired. Eq. 175; *Cross v. Cramp*, Ib. 193.

³ *Bowling v. Bowling*, 6 B. Mon. 31.

⁴ *Rowland v. Partin*, 1 Jones, Eq. 257.

⁵ *Ellis v. Commander*, 1 Strobb. Eq. 188.

⁶ *Swindall v. Bradley*, 3 Jones, Eq. 353.

§ 11. Where a debtor, pending a suit against him, removed with his property (slaves) from the State ; and after recovery of judgment, and after the plaintiff's execution had lost its active energy, the slaves were brought back ; it was held that he could sustain a bill to prevent their removal until he could revive his execution.¹

§ 12. When a party is surety on a bond given by a deputy sheriff to his principal, and has taken a mortgage on personal property for his indemnity, and the sheriff and the deputy have collected money for which the sheriff is sued, and the deputy has departed the jurisdiction, and a third person has got possession of the mortgage property on a pretended claim of right, and is charged with intending to remove it beyond the jurisdiction of the courts ; equity will restrain him by injunction, and require bond and security for its forthcoming, to respond to the mortgage.²

§ 12 a. A wrongful holder of premises cannot be removed therefrom by a preliminary *ex parte* process or order.³

§ 13. The effect of a temporary injunction, granted under the New York Code, § 219, is not to restrain any removal or disposition of the property of the debtor, but only a removal or disposition with intent to defraud creditors.⁴

§ 13 a. The plaintiff, a married woman, being the owner of a mill, her husband agreed to sell and convey to the defendant, A, an undivided half thereof, with fixtures, &c., and to lease one half the mill-yard, upon payment of certain sums. The parties carried on the business for some time, as partners, and then leased the premises to their sons. The plaintiff and her husband agreed with B the defendant, to convey to him the other half of the property, and rent the yard, on condition of payment of the consideration. A and B ran the mill together, new machinery being put in, and a mortgage given for the purchase-money. Upon a bill brought to enforce a lien for

¹ *Abrahams v. Cole*, 5 Rich. Eq. 335.

² *Outlaw v. Reddick*, 11 Geo. 669.

³ *People v. Simonson*, 10 Mich. 335.

⁴ *Brewster v. Hodges*, 1 Duer, 609.

the purchase-money, and prevent removal of the machinery, it was held that the injunction must depend upon the alleged lien ; and the bill was dismissed.¹

§ 13 b. In a contract between the plaintiff, a contractor, and the defendants, a railroad company, it was provided, that, in case of any delay or default in the work on his part, they might take from him the completion of the work, and use his plant, materials, or implements ; and that, in addition to all other rights and remedies against him, they might apply any contract moneys towards their losses or expenses, arising from the delay ; and that all the materials, &c., then in or about the works, should thereupon become their absolute property, be valued or sold, and the amount credited him upon his claim against them. They having acted under this clause, the plaintiff, after an unsuccessful attempt to obtain injunction, brought a suit upon the contract, which, with all matters in difference, was referred to arbitration. The line being nearly completed, and the defendants having begun to remove some of the plant and materials ; the plaintiff brings a bill to restrain them from such removal till an award should be made. Held, the plant, &c., did not, under the contract, become their absolute property, but only security or satisfaction for their losses and expenses, and the plaintiff was entitled to an interlocutory injunction.²

§ 14. Under the head of *removal*, may be noticed the *unlawful transfer of stock*, which is often mentioned as a proper subject of injunction. Thus an injunction was granted, until answer, against the transfer of stock, standing in the name of the defendant, a steward of the plaintiff, upon affidavits, tending strongly to show that the stock was the produce of the plaintiff's property, consisting of rents and profits received for many years without account. But the injunction was refused in reference to money standing in the name of the defendant at his banker's, the last payment having been made two years before, and the law not justifying a presumption that the money remained the same. Lord Eldon spoke of the case as

¹ *Widner v. Lane*, 14 Mich. 124.

² *Garrett v. Salisbury, &c.*, Law Rep. (Eng.) Eq., August, 1866, p. 358.

one of "astonishing improvidence in the plaintiff, not demanding any account, but taking such sums as the defendant pleases to feed his occasions with." His lordship further remarks: "The question then is, whether, if this stock and money are by his wrongful act confounded with his own, there is not a fair ground to say, that he, having mixed them, shall not be permitted to dispose of them, until he shall have satisfactorily distinguished, by an answer put in here, that which in conscience he never ought to have mixed. I do less mischief by fixing the injunction upon the whole till he informs me what is his master's, than by not fixing the injunction upon any part, giving him an opportunity of doing the enormous injustice, of which from these affidavits he appears capable." ¹

§ 15. The district court of Alleghany County (Pa.), has jurisdiction of a bill in equity for an injunction on the part of a complainant in possession under an equitable title, filed against the holder of the legal title, for the purpose of preventing a sale or conveyance, of quieting possession, declaring them trustees in equity, and of obtaining a conveyance.²

§ 16. A perpetual injunction, against one's alienating his interest in certain property as against the plaintiff's claims upon it, gives to the plaintiff an equitable lien upon that interest to the extent of those claims; at least as against the parties to the suit.³

§ 17. While parties are enjoined against aiding another in conveying or otherwise disposing of his property, they will not be permitted to secure an alienation thereof to themselves by proceedings at law against him as their debtor.⁴

§ 17 a. A creditor who has not reduced his claim to judgment and execution, nor in any other manner acquired a lien, cannot enjoin his debtor from disposing of his property, by a bill alleging that the debtor is selling his goods, and applying

¹ Lord Chedworth v. Edwards, 8 Ves. 46, 48, 50.

² O'Neil v. Hamilton, 44 Penn. 18.

³ Sheafe v. Sheafe, 40 N. H. 516.

⁴ *Ib.*

the proceeds to his own use, and the use of others, without consideration, and thus, and in other ways, is wasting his resources, and is sending large quantities of his goods beyond the reach of his creditors, and is utterly insolvent.¹

§ 18. A plaintiff may enjoin a third person, who is in possession of a sum of money in controversy, from paying it over to the defendant, where the plaintiff is in danger of losing it, owing to the claim of the defendant and his insolvency.²

§ 19. A garnishee is a "defendant in an action" within § 2, ch. 129, (Wis.) Rev. Sts., and may be enjoined from disposing of goods in his hands.³

§ 20. But a garnishee will not be enjoined from selling or disposing of property of the debtor in his hands, except upon the allegation that there is danger of loss from the garnishee's insolvency, before a trial can be had in the action at law.⁴

§ 21. An injunction was granted, before answer, forbidding B and C to part or interfere with goods, which A alleged, in a bill in equity, had been fraudulently obtained by B, and sold by a fictitious sale to C. But an injunction against the custom-house collector, in whose hands the goods were, was refused.⁵

§ 22. In the case of *Callan v. May* (2 Black, 541), where a Circuit Court had passed an order, to put a purchaser of property sold under its direction into possession; it was held, on appeal, that an appeal was not the proper remedy, but that the tenant, if he claimed possession under an agreement with the purchaser, might have obtained an injunction, which would have been appealable.

§ 23. Under § 3798 of the (Iowa) Revision of 1860, a creditor cannot restrain the disposition of real estate by his debtor.⁶

¹ *Rich v. Levy*, 16 Md. 74.

² *Denson v. Stewart*, 15 La. An. 456.

³ *Malley v. Altman*, 14 Wis. 22.

⁴ *Bigelow v. Andress*, 31 Ill. 322.

⁵ *Rateau v. Bernard*, 3 Blatchf. 244.

⁶ *Buchanan v. Marsh*, 17 Iowa, 494.

CHAPTER XIV.

TITLE AND EVICTION.

§ 1. Equity will not in general interfere by injunction, in favor of an owner of real estate, whose title is such as will sustain an action at law. Thus, in Georgia, the obligee in a bond for titles, who has paid the purchase-money and taken possession, holds the legal title, and may maintain trespass or other remedy for the protection of his property. In such case, if the obligor threatens to sell the premises to another person, or enters upon them and carries off the growing crops, no injunction will be granted.¹

§ 1 a. An injunction will not lie, to restrain a party in possession who claims title, and who expressly denies all title on the part of the complainant, either legal or equitable. Where title is in dispute, a temporary injunction is sometimes granted to preserve it until answer filed; but this is never done (in Maryland) unless the damage complained of is intolerable, and the mischief irreparable, or where the trespass goes to the destruction of the thing. Even where irreparable damage is apprehended, an averment to that effect is not sufficient; the facts must be stated, to show that the apprehension is well founded. The proper course, when an injunction is applied for, and the legal title is doubtful, is to send the complainant to a court of law, to have his title first established.² Lord Eldon remarked: "I remember when, if a plaintiff stated, that the defendant claimed by an adverse title, he stated himself out of court."³ And, in a case relating to a mill, the Lord Chancellor said: "In this case it has been put upon this ground,

¹ *Peterson v. Orr*, 12 Geo. 644.

² Per Lord Eldon, *Smith v. Collyer*,

³ *Chesapeake, &c. v. Young*, 3 Md. 8 Ves. 90.

that it is within the equity of this court to take *ex ab origine* a question whether or not a right is violated. It struck me immediately, from a general recollection of the cases, that the court has exercised no such jurisdiction. There are two ways in which applications to this court have been made in this kind of cases: first, in order to compel the party to try the right — secondly, to prevent a multiplicity of suits.”¹ But although equity has no authority, in general, to try questions of title to lands, it is otherwise where the whole dispute is on the construction of the bill or other written instrument, under which both parties claim.² So equity may interfere by injunction in favor of one who owns and has possession of the land, but upon whose title a cloud rests in consequence of an adverse claim.³

§ 2. Equity may restrain by injunction a citizen of the State from injuring real estate out of the State.⁴ So where a non-resident vendor of land is unable to make title, an averment, in a bill filed by the vendee, that the vendor is in very “slender circumstances,” and unable to respond in damages on her covenant of warranty, is sufficient to authorize the vendee to come into equity, to enjoin the collection of the purchase-money.⁵

§ 3. It is a general rule, that a party seeking an injunction, to protect him in the enjoyment of real property, must show a right, such as the court, upon his own showing, will feel bound to protect against the defendant. In respect to applications for injunctions to stay waste, such rule is strict. But where the *gravamen* of the case is an alleged fraudulent purchase by the defendant of the complainant, if the latter states his right so as to authorize him to complain of the fraud, and to entitle him to relief against it, this is sufficient.⁶ But, without an allegation of insolvency, a grantee cannot be enjoined from

¹ Weller v. Smeaton, 1 Cox, 103.

² Gibbs v. Elliott, 5 Rich. Eq. 327.

³ Eldridge v. Smith, 34 Verm. 484.

⁴ Great Falls, &c. v. Worster, 3 Fost. 462.

⁵ Graham v. Tankersley, 15 Ala.

634.

⁶ Outcalt v. Disborough, 2 Green,

Ch. 214.

entering and cutting timber, on the ground that the deed was obtained fraudulently.¹

§ 4. A vendee, who has acquired the legal title, cannot sustain a *bill of peace*. Thus equity will not enjoin an action of ejectment brought against a purchaser of real estate at a guardian's sale, the sale not having been reported to or approved by the Circuit Court, though he paid for the land, supposing his title perfect.² Nor, at the instance of a party claiming the legal title to land, a sale of the land by an adverse claimant.³ So where A conveyed to B a piece of ground, on condition that B should be restricted to the privilege of erecting or running a saw-mill or saw-mills thereon ; held, equity would not enjoin B from using the building on the land for other purposes, after he had incurred considerable expense in the construction thereof, or compel him to stop the machinery already in motion, where no sufficient excuse was rendered by A for his failure or neglect to apply for an injunction sooner.⁴

§ 4 a. The following case, as stated in the opinion of Lord Eldon, is often cited. " The bill was filed by an elder brother against his younger brother. The former had in his possession, at the time of the death of their father, certain indentures, conveying an estate to the latter, and the purpose for which they were executed was stated to be that, in case any information should be exhibited against him for sporting without a qualification, he might go to the chest of his father, and, by producing them, defeat any such information. The father died with these deeds in his own possession. They had been delivered, in the technical sense of the word, but not to the younger son, and the younger son in his answer states that his father had been in the habit of making him certain allowances, as one of his sons, and that he retained the rents of these lands by way of reimbursing himself of the advances he so made. The bill alleged that the father made his will by which he left the estates to his eldest son, and that some time

¹ M'Quarrie v. Hildebrand, 23 Ind. 122.

² Young v. Dowling, 15 Ill. 481.

³ Overseers, &c. v. Hart, 3 Leigh, 1.

⁴ Water Lot Co. v. Bucks, 5 Geo 315.

after the death of the father, the younger son came to his elder brother, and told him that he had made a bet with A B that he was a man qualified to sport, and he desired him, in order to win that wager, to put into his hands these indentures that he might show them to A B. If the father executed these deeds for the purpose which the plaintiff alleges, it might have become a considerable question, if the younger son had got possession of these deeds, whether a court of equity would have done anything to relieve the father. The deeds were left in the possession of the father till his death, and the eldest son then obtains possession of them. He states in his bill that he thought it necessary to show them to his brother, to enable him to win this bet, intimating that he was very wrong in so doing, and contending that he had no qualification; but he lends himself to the purpose of imposing upon A B. That having been done, and whether or not the younger son was looking to any purpose beyond that which the elder son says was his pretence, he turns round, as the plaintiff alleges, and says, now I have got these deeds, I shall give notice to the tenants not to pay their rents to you any longer, but to pay them to me as owner of the estate; and he brings an ejectment to get into possession. *Prima facie*, with these deeds in his hands, there was nothing to impede that ejectment; and the plaintiff accordingly files his bill for an injunction and the delivery of the deeds. — The court directed the defendant to try an ejectment. — The defendant at law sets up an old outstanding estate, and defeats the ejectment; and application is afterwards made to the court which ordered the trial, and it directs that no outstanding estate should be set up. My opinion about that is, that, in a case such as this is, that order ought not to have been made. — If it was right to let the ejectment decide the matter under the circumstances in which these parties stood, it was right to let it decide the matter, as it would have been decided in the actual circumstances in which they stood before the order was made; and it is a very different thing to say, there may be an equity arising out of circumstances, to prevent an individual setting up a term to defeat an ejectment, and to say, merely, because an ejectment is brought, it shall not be set up. I shall, therefore, discharge

the order for not setting up the outstanding estate, but without prejudice to the defendant's filing any bill for that purpose. — If the defendant chooses to file a bill to put the term out of the way, the court, if a proper case were made, might, perhaps, be able to relieve him; but it cannot be done on motion." ¹

§ 5. Eviction from real estate purchased with warranty is sometimes a ground of injunction. (See Chap. XXVIII.) Thus, where A agrees to convey to B by warranty deed, but conveys only his "right, title, and interest," or with a warranty to defend "the aforesaid premises," and the land is subject to mortgage; B may enjoin a suit on the note given for the purchase-money, till the mortgage is discharged and a proper deed given.² So in a late case A purchases land of B, giving a mortgage back for the price, and then contracts to sell to C, who has no notice of the mortgage. B then records the mortgage, after which C receives a warranty deed from A, taking possession, paying part of the price, and giving two negotiable notes for the balance, which A delivers to D and E severally, as collateral security, but without indorsement, and afterwards dies insolvent. B files a petition for foreclosure of his mortgage and a sale of the land, making C a party, as being in possession and claiming title. C files a cross petition. All parties in interest being before the court, held, C was entitled to enjoin the collection of so much of the notes last falling due as would cover the mortgage. The court remark as follows: "It is further contended in behalf of James Thompson, that Weller ought not to be allowed to avoid the payment of the remaining note, but ought to be turned over to such remedy as he may hereafter have on the covenants of warranty, and this for the reason that he has not yet been evicted. And *Picket v. Picket*, 6 Ohio, St. Rep. 525, is cited in support of this position. In that case it was held, that 'a purchaser of land, who has received a deed containing a covenant of warranty, cannot plead in bar to an action on the note given for the purchase-money, defect of title, unless

¹ *Brackenbury v. Brackenbury*, 2 Jac. & W. 392. ² *Bowen v. Thrall*, 28 Verm. 382.

he has been evicted by title paramount.' Without questioning the authority of that case, we may say that it was an action at law in assumpsit, in which principles governing courts of law were rigidly applied, and which evidently ought not to be extended. The case before us is in the nature of a proceeding in equity, and the parties in interest are all in court, and their rights are open to consideration and adjustment. There it did not appear but that the warrantor was, or would be, fully able to respond to an action on his covenant when it should mature; here, the warrantor is dead, and his estate insolvent; in that case there was no eviction, and *non constat* that there ever would be; in this the decree we are about to render establishes a constructive eviction to the extent of the mortgage incumbrance. There will be a judgment for plaintiffs for the sale of the mortgaged premises, unless the amount remaining due on the mortgage is paid by a day to be named, and an order perpetually enjoining," as above.¹

§ 6. Insolvency and want of title of a vendor of land furnish no ground of injunction against a judgment upon a note for the price, although the conveyance is to be made at a future time.²

§ 7. A warrantor of title, having no interest in land except by his warranty, it seems, cannot singly maintain a bill for quieting possession of the land by an injunction, and which seeks nothing more.³

§ 8. Where B falsely pretended that he held the bond of C, to make him a title to land, and sold his interest to A, partly for cash and partly for A's bonds; held, A was entitled to have the collection of the balance of the purchase-money enjoined, and to a decree for repayment of the sum advanced; but, as preliminary thereto, he must surrender possession of the land.⁴

¹ Kyle v. Thompson, 11 Ohio St. 616-22-3, per Brinkerhoff, J.; acc. Wiley v. Howard, 15 Ind. 169; Yonge v. McCormick, 6 Flor. 368.

² Kelley v. Kelley, 2 Duv. 363.

³ Brooks v. Fowle, 14 N. H. 248.

⁴ Brannum v. Ellison, 5 Jones, Eq. 435.

§ 9. A, being about to purchase land of B, and ascertaining that C had obtained a judgment against B, refused to purchase unless C would release his lien; C thereupon executed a paper purporting to relinquish his lien, but not under seal, and not naming any consideration, nor any releases; and A thereupon paid a part of the purchase-money, a part of which was applied upon C's judgment. C having levied his execution upon the land, for the unpaid balance of his judgment, A brought a bill in equity for an injunction. C introduced evidence, that, at the time of the release, A agreed to pay a certain note, given for a part of the purchase-money, to C, but had, instead, paid it to B. It was decreed, that A should pay the amount of the note to C before he could be entitled to an injunction.¹

§ 10. Where the vendor of land was unable to convey at the time fixed, had always remained in possession, and was insolvent, and the vendee was a weak and ignorant man, easily imposed upon, and had given his notes for the purchase-money; the sale was rescinded, as also a mortgage to secure the purchase-money on other land of the vendee, and suits to recover the purchase-money perpetually enjoined.²

§ 11. Where a vendor mortgaged the land to a third party, who filed a bill, in which there was a decree for a sale, and a sale and conveyance accordingly of all the interest of the mortgagor and mortgagee: held, the vendor's title was extinguished; that the vendee could sustain a bill for a rescission of the contract, on the ground of want of title, without payment or tender of the purchase-money; that the vendor, or his assignees, ought not to be allowed to recover the purchase-money; and that a judgment on a bond for it would be perpetually enjoined.³

§ 12. The plaintiff, having given a bond for the purchase-money of land, which was assigned, gave to an assignee a new bond, in consideration of an extension after several inter-

¹ *Scott v. Bennett*, 3 Gilman, 243.

² *Liddell v. Sims*, 9 S. & M. 596.

³ *Buchanan v. Lorman*, 3 Gill, 51.

mediate assignments, and the first bond was cancelled. An action being brought on the new bond, the obligor brought a suit to enjoin the judgment, on the ground of an incumbrance on the land, the purchase of which formed the consideration of the bond, which incumbrance, he alleged, he had no knowledge of, or had forgotten at the time of the purchase. It appearing that the incumbrance was a mortgage, made by the obligor's brother, who formerly owned the land, and who had become the surety in the new bond, which mortgage was recorded in the office of the obligor, who was clerk of the county court; and it not appearing that the assignee, who took the renewal of the bond, had any notice of the incumbrance: held, the obligor was not entitled to relief.¹

§ 13. Where, under the (Cal.) Practice Act, § 254, a preliminary injunction is granted against selling the premises in controversy, it will be dissolved upon the filing of an answer setting up paramount title in the defendants.²

§ 14. Where an action is brought to quiet title, and a decree for the plaintiff enjoins further contesting such title; the defendant may still set up an after-acquired title.³

¹ *Washington v. Pollard*, 5 Gratt. 432; *Washington v. Lumpkin*, 5 Gratt. 432.

² *Curtis v. Sutter*, 15 Cal. 259.

³ *Wetherbee v. Dunn*, 10 Min. 106.

CHAPTER XV.

PARTIES — CORPORATIONS.

1. General doctrine.
4. Application for change of charter.
6. Taking of private property.
8. Protection of franchise.
9. Mismanagement of funds, &c.
11. Directors, stockholders, &c.
14. Miscellaneous grounds.
16. Cities and towns
22. Churches, &c.
23. Banks.
28. Bridges.
29. Miscellaneous.

§ 1. HAVING considered the *grounds* for interference of a court of equity by way of injunction, we now proceed to an inquiry as to the *parties* who may avail themselves of this relief.

§ 2. No class of parties is more frequent, in the present period of numerous and varied companies for the accomplishment of public undertakings and improvements, than that of *corporations*. And in reference to corporations it is held, that, where a corporation have the power of doing or not doing an act, at their discretion, equity will not interfere with the lawful exercise of the discretion, however injurious its consequences, unless it infer fraud.¹ But, although the operations of large companies ought not ordinarily to be arrested by injunction without notice, yet it is a matter resting in the sound discretion of the court; and, if a master allows such an injunction without notice, the chancellor will not of course dissolve it, though he might have exercised the discretionary

¹ *Semmes v. Columbus*, 19 Geo. 471.

power differently.¹ And the distinction is made, that, where a corporation employs its powers and funds for purposes not within the scope of its charter, a stockholder may have a remedy by injunction. But, independently of its thus exceeding its powers, the will of a majority, properly expressed at a legal meeting, must control.² (a)

§ 3. Equity has jurisdiction against a corporation, when the money which should be divided among the stockholders has been applied contrary to the charter or articles of agreement. Such misapplication is held a breach of trust and a fraud on the part of the majority towards the minority, who may have a remedy by injunction. Intentional wrong or actual fraud is not necessary to sustain such bill.³

§ 4. Questions have arisen, in case of proposed applications, on the part of corporate bodies, to the legislative power, for some change in their chartered privileges. Thus where shareholders of a company had resolved to use its funds and pledge its credit, and make contracts, for the purpose of applying to Parliament to vary the original object contemplated by the original charter; an injunction was granted to other shareholders.⁴ So an injunction was granted to restrain the corporation of Norwich from soliciting, at the expense of the borough fund, a bill in Parliament, to enable them to improve

¹ Perkins v. Collins, 2 Green, Ch. 482. See Capner v. Flemington, &c., 515.

² Green, Ch. 467.

³ March v. Eastern, &c., 43 N. H.

⁴ The Great, &c. v. Rushout, 5 De Gex & Sm. 290.

⁵ Gifford v. New Jersey, &c., 2 Stockt. 171.

(a) An injunction, against the execution and delivery of deeds of village lots, sold for taxes which are alleged to have been illegally levied and assessed; is not "an injunction to suspend the general and ordinary business of a corporation," within (Wisconsin) Rev. Sts. c. 129, § 7, and may be granted by a court commissioner. Doty v. Menasha, 14 Wis. 75.

The (Penn.) Supreme Court has the supervision and control in equity of private corporations, and this involves the power of issuing injunctions, when necessary to effectuate that control, although the case may not fall within the class of irreparable injuries. Baptist, &c. v. Scannel, 3 Grant, 48.

A corporation, owing its corporate existence in part to the State of Maryland, and exercising its functions in that State, may be restrained there, from expending its funds, for any other than corporate purposes, anywhere. State v. Northern, &c., 18 Md. 193.

the navigation of the river flowing through that town to Yarmouth.¹ So a stockholder and creditor in a corporation is entitled to an injunction and a receiver, where the trustees have undertaken to sell to a new company, in which they were largely interested, substantially the whole property and interest of the corporation.² So a stockholder in a corporation may by injunction restrain the company from an act, which, though expressly authorized by the legislature, and though the charter expressly provides that it may be altered, modified, or repealed by the legislature, changes the purpose of the corporation. As where the company was incorporated for the purpose of constructing a railroad only five miles long; and the legislature authorized its extension twelve miles further.³ So an injunction lies, in favor of the minority against the majority of the members of a corporation, to prevent the surrender of the charter with a view to obtaining a new one for a new and different object.⁴ In reference to a clause in the charter providing for a committee of management, "to do all such acts as shall appear to them necessary—in order to carry into full operation—the object—of the society, so always that the same be not inconsistent with—the provisions of this our charter," the Vice-Chancellor remarks: "Now, certainly, one cannot imagine anything more repugnant to worldly existence, either natural or artificial, than death, whether natural or civil.—The powers of the committee and of the general meeting to direct the use of the common seal are limited by conditions, which are inconsistent with the notion of applying the common seal for the purpose of procuring the annihilation of the society. The law allows a corporation having perpetual succession and continuance;—the law allows individuals to acquire a beneficial interest in the preservation of such a body.—I am not aware of any principle,—which can enable that lawfully—constituted interest—to be taken away, without the consent of every person interested, unless by means of a condition to which the original creation was sub-

¹ *Atty.-Gen. v. Norwich*, 16 Sim. 225. See *Simpson v. Denison*, 10 Hare, 51.

² *Abbot v. American, &c.*, 33 Barb. 578.

³ *Zabriskie v. Hackensack, &c.*, Am. Law Rev., July, 1867, p. 755.

⁴ *Ward v. Soc'y, &c.*, 1 Coll. (28 Eng. Cha.) 370.

ject.—I am not prepared to say, that it can be in the power of any person or persons, to whom the general authority of using the common seal is entrusted, to use it, without at least the consent of every member—for the purpose of changing the nature of the institution.”¹

§ 5. But, on the other hand, the defendants, a railway company, agreed to purchase land of the plaintiff, and the act so provided; whereupon he withdrew his opposition. The defendants afterwards applied for authority to abandon the branch which affected this land, and for a repeal of the clause referred to. Held, such application should not be restrained by injunction.² So the plaintiff agreed with the defendants, a railway company, to withdraw his opposition to their bill in Parliament, in consideration of their completing their line in a certain way. The defendants afterwards found themselves unable to go on, and gave notice of their intention to apply to Parliament for authority to abandon their road. Held, an injunction would not lie, to restrain such application. Lord Cottenham remarked: “It has been suggested that this court could not interfere with infringing upon the privileges of Parliament; so the courts of common law thought at one time; and there is as much foundation for the one as for the other supposition. In both cases this court acts upon the person, and not upon the jurisdiction. In a proper case, therefore, I have said here and elsewhere, that I should not hesitate to exercise the jurisdiction of this court by injunction, touching proceedings in Parliament for a private bill or a bill respecting property; but what would be a proper case for that purpose it may be very difficult to conceive. The case of Parliament differs widely from that of the courts of common law; the province of the latter is to enforce legal rights, and the object of the injunction is to prevent an inequitable use of such legal right, but the ordinary province of Parliament in such bills is to abrogate existing rights, and to create new rights. To hold, therefore, that no application should be made to Parliament, because the object of the application was to inter-

¹ *Ward v. Soc’y, &c.*, 1 Coll. (28 Eng. Cha.) 378, 380.

² *Steele v. North, &c.*, Law Rep. (Eng.) Eq., April, 1867, p. 237.

ferre with some right or interest of some other party, would be in effect to hold that this court should by its injunction deprive the subject of the benefit of parliamentary interference in such cases. The injunction, therefore, cannot be granted, upon the ground that the act applied for would interfere with existing rights, it being the very object of it to do so. What difference, then, can it make, whether such preëxisting right exists by the tenure of property or by virtue of contracts? In both cases Parliament has the same power of destroying, altering, or affecting such preëxisting rights, providing, as it always does or intends to do, compensation to the party affected; and in neither has this court a right to interfere by injunction to deprive the subject of the right of applying to Parliament for a special law to supersede the rules of property by which he finds himself bound, whether arising from contract or otherwise.”¹ And in a very late case it is remarked, “You may interfere to prevent a person applying to Parliament, because you are not interfering with the functions of Parliament, but you are acting on the person, and restraining him from taking a step which the court says ought not to be taken. But no case has been produced to me in which the court has ever prevented an application to Parliament for an act. — We have been told by judges of great eminence that the court has power by injunction to prevent an application to Parliament; but they all decline to define the occasion which would justify such an interference, and even express an opinion as to the difficulty of conceiving a case.”²

§ 5 a. An injunction was asked, to restrain a common council from passing an ordinance, allowing the extension of a horse-railroad for the purposes of connection with another road. Held, the road derived its power to extend, if it had it, entirely from the legislature, and, even in a case of doubt as to its power, the ordinance only amounted to the expression of a desire on the part of the council, being of no effect, and therefore a legal injury to no one; and that the injunction should be denied.³

¹ *Heathcote v. The North, &c.*, 2 *v. North, &c.*, Law Rep. (Eng.) Eq., Mac. & G. 100. April, 1867, pp. 240-1.

² Per Lord Chelmsford, L. C., Steele

³ *Chicago v. Evans*, 24 Ill. 52.

§ 5 b. A stockholder in a railroad cannot restrain a sale of all the property of the corporation to another company, under an act of assembly. But such a sale operates as a dissolution of the corporation, which is not a corporate act, but, like that of association, the act of the individual members; and a stockholder cannot be compelled to take pay for the shares in the old company in shares of the new; nor have a majority of members a right to transfer all the corporate property to the other corporation, and take pay in shares of the new, thus divesting the interests of the dissenting stockholder, without first giving him security for his interest.¹

§ 5 c. A stockholder in a corporation, the charter of which, by (Mass.) St. 1830, c. 81, is subject to alteration, amendment, or repeal, at the pleasure of the legislature, cannot maintain a bill in equity to restrain the corporation from engaging in a new enterprise in addition to that contemplated by the charter, but of the same kind, if it is sanctioned by an express legislative grant, and by a vote of the majority of the stockholders.²

§ 6. An injunction will issue to restrain a *city* from taking private property without legal right.³ (See *Railroads*.) And, in general, except where the public necessity admits no delay, equity will enjoin the taking of private property, without first making compensation.⁴ So an injunction lies against taking land, till security is given for the value, although the party has not petitioned for damages.⁵ Though not where the appraisers have returned that no damages be paid. The remedy in such case is by *appeal*.⁶ So if the power of taxation in a municipal corporation is so limited, as not to be adequate to pay, within any reasonable time, the damages caused by the opening of a public street; a court of equity will prohibit such opening by injunction, until security for payment be given.⁷

¹ *Lauman v. Lebanon, &c.*, 30 Penn. 42.

² *Durfee v. Old Colony, &c.*, 5 Allen, 230.

³ *Lumsden v. Milwaukee*, 8 Wis. 485.

⁴ *Penrice v. Wallis*, 37 Miss. 172.

See *Standish v. Liverpool*, 15 Eng. Law & Eq. 255.

⁵ *Somer v. Philadelphia*, 35 Penn. 231.

⁶ *McCrary v. Griswold*, 7 Clarke, 248; *Connolly v. Same*, *Ib.* 416.

⁷ *Keene v. Bristol*, 26 Penn. 46.

So a harbor improvement company, in the prosecution of their works, under the authority of a special act of Parliament, obstructed access to a wharf from the place of business of A, by which he was put to expense in loading and unloading ships. A, claiming compensation, gave notice and proceeded to appoint an arbitrator, under the 68th section of the 8 Vict. c. 18 (the lands clauses consolidation act, 1845). Upon a bill filed by the company, an injunction was granted to restrain the further proceedings of A until he established his right at law, but on appeal it was dissolved.¹ While, on the other hand, an injunction, to restrain an appropriation of public property to private purposes, will not be dissolved upon the coming in of the answer, admitting the acts charged, but denying that the public interest will be thereby prejudiced.² So a municipal corporation may be restrained by perpetual injunction from entering upon and taking possession of land, and opening and grading a street thereon, by virtue of proceedings regular in form, where it appears by an extrinsic fact that the commissioners have awarded the owner of the land only one dollar for land worth twelve dollars. In such case, it seems that *certiorari* is not an adequate remedy.³

§ 7. But, that a statute allows the taking of city property without compensation, is an objection to it which neither the people, nor private persons, for whom compensation is provided, can raise, as the basis of an application for injunction. Certainly they cannot take the objection at the hearing, when the bill alleges that all the property interfered with is private property.⁴ And, although a city cannot occupy or appropriate private property without compensation, or do direct, incidental, wanton damage to private property, the exercise of its discretion within proper limits cannot be enjoined.⁵ So, although persons obtaining from the legislature power to interfere with the rights of property are bound strictly to adhere to such powers, to do no more than the legislature has sanc-

¹ Sutton, &c. v. Hitchins, 1 Eng. Law & Eq. 202; 9 Ib. 41.

² Atty., &c. v. Cohoes Co., 6 Paige, 133.

³ Baldwin v. Buffalo, 29 Barb. 396.

See Betts v. Williamsburg, 15 Barb. 255.

⁴ People v. Law, 34 Barb. 494.

⁵ Plum v. Morris, &c., 2 Stockt. 256

tioned, and to proceed only in the mode which the legislature has pointed out ; yet (except in a proceeding at the instance of the attorney-general) any one seeking the assistance of a court of equity, to restrain the violation of such a contract with the legislature, is bound to show that he has a private interest in the matter. Therefore, where a water-works act empowered a company to divert the water of a stream (without limit as to quantity), by means of an open channel filled with loose stones, and they were diverting it by means of a culvert ; it was held that another company, who were entitled to the water of a stream into which the diverted stream had flowed, were not entitled to an injunction to restrain a violation of the terms of the act, as to the mode of diversion.¹

§ 8. An injunction will be granted to prevent the franchise of a corporation from being destroyed, as well as to restrain a party from violating it by attempting to participate in its exclusive privileges.² It is foreign from the plan of the present work, even to refer to the numerous and important cases, in which the questions have been discussed, how far the grant of a franchise is a *contract*, and the franchise itself *private property*, the former of which, by fundamental constitutional provisions, cannot be impaired, nor the latter appropriated without compensation to public uses ; or under what circumstances a subsequent grant of a similar or rival franchise interfering with the former one is, upon the grounds mentioned, unconstitutional and void. (See *Railroads, Bridges, Ferries*.) In a late and important case in Pennsylvania, the prevailing doctrine on the subject is thus explained : “ All acts of incorporation and acts extending the privileges of incorporated bodies, are to be taken most strongly against the companies. Whatever is not expressly and unequivocally granted in such acts is taken to have been withheld.³ The same rule was laid down in very clear terms by Chief Justice Marshall, in *Billings v. The Providence Bank*.⁴ In the *Charles River Bridge v. The Warren Bridge*,⁵ it was

¹ *The Mayor, &c. v. Corley, &c.*, 21 Eng. Law & Eq. 620.

² *Osborn v. Bank of the U. S.*, 9 Wheat. 738.

³ 11 East, 685 ; 4 Bingham, 452 ; 2 Barn. & Adol. 635.

⁴ 4 Peters, 514.

⁵ 11 Peters, 521.

placed on grounds so impregnable by the present Chief Justice of the Supreme Court of the United States, that it is not probable we will ever hear it questioned again.”¹ On the same subject it is said: “Where a party claims a franchise under a statute, and is in the possession and enjoyment of such franchise, equity will interpose to protect and secure the enjoyment of such franchise, because it affords the only plain and adequate remedy. In the present case, certain rights and franchises were granted to the plaintiffs, by the legislature, upon the ground that the enjoyment and exercise of them would not only be a benefit to the persons incorporated, but would also contribute to the public benefit. Another ground is, where the party complained against professes to act by public authority, to enter upon, and to a certain extent to use the land of third persons, and exceeds his authority, it is held to be a peculiarly proper case for the interposition of a court of equity. It is also another ground that what the defendants propose to do, and claim a right to do, is the erection of a work, which is in its nature permanent and perpetual. It is not like the case of a single or temporary disturbance, the injury arising from which can be measured and estimated and compensated in damages in a single suit; the plaintiffs would be compelled to bring successive suits from time to time. This is more especially a ground of interference, where the party complained against professes to exercise a public authority, and where the claim is to appropriate the property or franchises of the complainant, to a purpose claimed to be public, and where the plaintiff denies and contests the right of the defendant to exercise such power.”²

§ 8 a. A corporation, constructing works beyond what is necessary for the purposes of the incorporation, and beyond what is contemplated by the charter, will be restrained by injunction.³

§ 9. One interested in a trading corporation may enjoin the

¹ Per Black, C. J., *Packer v. Sunbury, &c.*, 19 Penn. 211.

² Per Shaw, C. J., *Boston Water, &c. v. Boston, &c., R. R.*, 16 Pick. 525.

³ *Newark, &c., v. Elmer*, 1 Stockt. 754.

directors from mismanaging the business or wasting the funds.¹ (See § 11.) But, in New Jersey, the court will not grant an injunction and receivers on an incorporated company, under the "act to prevent frauds by incorporated companies," unless the protection of the public or the interest of the stockholders require it.² So a motion to restrain and enjoin will be refused, where, upon pleadings and proof, the court would not be warranted in declaring a corporation insolvent, and subjecting it to the provisions of the act.³ Chancery will interfere to prevent a disposition of the property of a corporation for other than corporate purposes, upon a proper case made out; but as to what is a proper case, the court will be guided by the general principles upon which it usually exercises its powers.⁴ So, in New York, under the act to prevent frauds by incorporated companies, where it is proved that an insurance company is insolvent, the chancellor is not bound, as of course, to issue an injunction, but must use his discretion, and take such course as will inure to the benefit of all concerned.⁵ So when a contract with a corporation is fulfilled to the satisfaction of the directors, and the work is beneficial to the corporation, and done on favorable terms, equity will not enjoin payment of the stipulated compensation, on the allegation of a stockholder, that there is a secret agreement between one of the directors and the contractor to divide the profits.⁶

§ 10. Where the rules of a friendly society were framed on erroneous principles, and the annuities chargeable on the funds had in consequence become so numerous as to be likely to exhaust the whole; upon a bill filed against the committee and trustees for the purpose of a dissolution, an injunction was granted to restrain further payments and the selling of the stock.⁷ (a) So a corporation proposing illegally to lease an important ferry for ten years may be enjoined.⁸

¹ *Sears v. Hotchkiss*, 25 Conn. 171.

² *Rawnsley v. Trenton, &c.*, 1 Stockt. 347.

³ *Rawnsley v. Trenton, &c.*, 1 Stockt. 95.

⁴ *Kean v. Johnson*, 1 Stockt. 401.

⁵ *Farrand v. Marshall*, 21 Barb. 409.

⁶ *Havens v. Hoyt*, 6 Jones, Eq. 115.

⁷ *Reeve v. Parkins*, 2 Jac. & W. 389.

But see *India, &c.*, 17 Sim. 15.

⁸ *People v. New York*, 32 Barb. 102.

(a) In *Ellison v. Bignold*, 2 Jac. & W. 511, Lord Eldon speaks of "those very distressing cases, where persons who have been expecting a provision for

§ 11. A stockholder may enjoin the directors of a corporation.¹ (See § 9.) So where a suit was brought against a

¹ *Mississippi, &c. v. Cross*, 20 Ark. 443.

their old age from benefit societies, have found themselves at last disappointed, from the societies being founded on erroneous principles. The court has there been obliged to consider the whole as originating in a blunder, and to put an end to them by a dissolution."

The following case is found in the (Philadelphia) Legal Intelligencer. Supreme Court. *Ford et al. v. Coal Co.* Nisi Prius. Sur bill and answer in equity. Opinion by Sharswood, J.

The plaintiffs are certain stockholders of the corporation defendants, and they complain that instead of dividing the surplus profits among the stockholders, in the shape of dividends, they are about to adopt the policy of setting aside so much annually as will eventually sink the capital. The answer sets out the contemplated action at large, and both parties are desirous of having the opinion of the court upon the lawfulness of the proposed measure.

The Locust Mountain Coal and Iron Company was incorporated by an act of April 5, 1842, upon the model of the act of May 25, 1839, entitled "An act to incorporate the Anthracite Iron Company." By this act the affairs of the company were to be managed by directors, one of whom to be the president, who shall be chosen by the stockholders annually on a day and in a manner prescribed; and by the tenth section "Dividends of so much of the profits of said corporation, as shall appear advisable to the directors, shall be declared twice in every year," . . . "but they shall in no case exceed the amount of the net profits actually acquired by said company, so that the capital stock shall never thereby be impaired." The capital of the company consists in the land it owns. By the charter, having acquired land, it was authorized to divide the same into stock, and issue certificates accordingly at a certain rate per acre. The value of the stock depends on the value of the land. The value of the land consists in the coal. When that is exhausted the land will be scarcely of any value. In this way the value of the shares of the stockholders will be yearly decreasing, though by the division of the net receipts semi-annually, large dividends will necessarily be declared, a fictitious value will be given to the stock in the market, those who understand the operation of things will be enabled to sell at a large advance, and the unfortunate purchaser, after receiving his large interest for a few years, will suddenly and unexpectedly find his capital gone. It is against this result the directors desire to provide. Their plan, in its general features, is to retain out of the price received from the coal as taken out of the land, a small sum of money, and accumulate the same, till it shall amount to the par of the outstanding certificates of the capital stock. A careful estimate has been made by their engineer of the amount of coal in their ground, and a calculation based on this estimate as to when the entire coal will be exhausted.

The directors of this company are certainly invested with discretionary powers over this subject. They are to declare dividends of so much only of the profits as shall appear advisable to them. Indeed it may well be doubted whether where a part of the capital is annually converted into money — as in this case, by the sale of coal from which they derive their royalties, which constitute their annual receipts — such part can lawfully be distributed as dividends. The directors are expressly prohibited from making any dividend, which shall impair the capital stock, under a heavy penalty upon such of the directors as

corporation, in Massachusetts, on a judgment rendered in New York, and no defence had been made by the company in

shall consent to such a dividend. But apart from this consideration, the exercise of such a discretion cannot be controlled by a court of equity, so long as it is honestly exerted, with no ulterior, personal, or selfish ends, and with a view to subserve the true interests of the stockholders. However unwise the policy adopted may be in the estimation of the chancellor, he has no right to substitute his discretion for theirs. To do so would make him head manager of all the corporations within the reach of his process. In this case, too, the stockholders, at their annual meeting, February 4, 1867, passed a resolution approving of the creation of a sinking fund for the purpose of securing the par value of the capital stock of the company on the plan recommended by the board of directors. At this meeting a stock vote was taken, which resulted in 15,469 in favor, to 3,302 votes against it.

I do not doubt that it is perfectly lawful for the directors to establish such a sinking fund, and to set aside such portion of their receipts from time to time as they may deem necessary and proper. There is, however, one feature in this plan about which I have had great difficulty, that is, the creation of a trust for this purpose. Three stockholders are to be appointed trustees, \$80,000 of the general improvement fund is to be paid to these trustees, two cents per ton on the quantity of coal sent to market from the company's lands during 1866, and on the first of February of every subsequent year a similar sum of two cents per ton on the number of tons of coal sent to market during the preceding year. These funds are to be invested by the trustees in the stock of the company, inviting offers from the stockholders and being bound to take the stock offered at the lowest bid. If none are offered, then the trustees are to invest "in any other securities authorized by the laws of this Commonwealth." I do not know whether this is regarded as an essential feature of the plan. I can see no object in creating such a trust, except that of nailing and clinching this policy on the company—in other words of tying the hands of all future boards of directors. It may well be claimed after the creation of such a trust, that all future purchasers of stock will buy on the faith of it, and will have a right to insist that the trust shall continue without modification. After much reflection I have come to the conclusion that this feature of the plan is *ultra vires*, beyond the power of any board of directors or of a majority of the stockholders. The charter has confided the management of the affairs of this corporation to directors to be annually chosen by the stockholders. It will hardly be pretended that any one board of directors could transfer the entire assets to trustees, upon some rigid, unbending policy, thus divesting themselves and their successors of all that discretion with which they are clothed by the charter, and thus depriving the stockholders in effect of all that power which they possess over such policy by electing directors, who will carry out their views. If they could not thus transfer their entire powers, neither, it seems to me, can they transfer a part. It has been held in England to be unlawful for a company, without authority from Parliament, to delegate its powers to another company. Thus, where a company had proceeded to a certain extent in making a railway, and being then in want of funds, entered into an agreement with another, that when the line was completed, it should be worked by that company, who should exercise all the rights of the original company for twenty-one years, Lord Cranworth held that this agreement was illegal, and restrained the parties from carrying it into exe-

New York; a temporary injunction was granted, restraining the suit, on a bill filed by an individual stockholder.¹

§ 12. A preliminary injunction should not issue upon the complaint of a minority of the directors, to restrain a person from voting on an alleged excess of stock, which the company have taken no steps to declare void, where it does not appear that his voting would produce irreparable and permanent injury, or any great and imminent danger.²

§ 13. So in an application for injunction, to restrain the holders of stock in a corporation from selling or transferring it, and from voting upon it at the next election of directors, which was to occur within three days from the filing of the bill; held, the injunction should be granted for the former purpose, but not for the latter, as this might change the result

. ¹ Sumner v. Marcy, 3 W. & M. 105. ² Reed v. Jones, 6 Wis. 680.

cution. Beman v. Ruffard, 1 Sim. N. S. 556. And it is said in an elementary work of reputation, that this principle is now clearly established by late decisions. Sir W. Hodges, on the Law of Railways, 93. It is true that it was decided in Dana v. The Bank of the United States, 5 W. & S. 224, that the directors of a corporation may make an assignment in trust for the payment of debts. But I do not regard that case as at all an authority in favor of this trust. In regard to the debts of a corporation, the directors have no discretion but to pay them, and if a company should become embarrassed and a race for priority take place among their creditors, whom they cannot pay in full, it would be their duty to provide for the equal pro rata distribution of their property in the only way in which they could accomplish it, by an assignment in trust for their creditors. Nor do I doubt for an instant and for the same reason, that a trust may be created for a sinking fund for the payment of loans or other debts, which may be enforced and protected by the interposition of a court of equity, for the benefit of the *cestuis que trust*, the bondholders or other creditors. But this trust for the company itself, divesting *pro tanto* the discretion of the directors and ultimately of the stockholders themselves in the management of their own property, seems to me a very different thing. It relieves me much to know that this case is to be carried by appeal, in any event, to the Supreme Court, and the decision of that tribunal invoked. As I am at present advised, let it be declared that the directors of the Locust Mountain Coal and Iron Company, the defendants, have power, in the exercise of their discretion, to create a sinking fund to secure the par value of the capital stock of the company out of their annual receipts, but that they have not power to pay over or transfer any of the moneys or assets to any persons as trustees in trust for such a purpose, and let an injunction issue to restrain them from any such transfer or payment.

of the election, and take from a majority of the legal stockholders the control of the company, without opportunity for a hearing.¹ (a)

§ 14. Unless there has been tardiness in the organization of an incorporated company, it may have relief by injunction, against wrongs done and threatened between the act of incorporation and the issuing of letters patent.²

§ 15. Where there is a mortgage upon the capital stock of a corporation, and the treasurer is one of the mortgagees, an injunction will be granted to stay a sale under a power in the mortgage, until the treasurer shall furnish to the mortgagor any information relative to the condition of the corporation, and affecting the value of the stock, which the treasurer may have obtained by virtue of his office, beyond what appears from the books of the corporation.³

§ 16. *Cities and towns* constitute a class of corporations or *quasi* corporations, with reference to which the process of injunction is often invoked. (b) Thus, in Massachusetts, a

¹ *Hills v. Parrish*, 1 M'Cart. 380.

³ *Frieze v. Chapin*, 2 R. I. 429.

² *Packer v. The Sunbury, &c.*, 19 Penn. 211.

(a) In Wisconsin, an injunction, to restrain an alleged stockholder from voting for directors, does not suspend the general and ordinary business of the corporation; and therefore, under Code § 132, may be granted by the court commissioner. *Reed v. Jones*, 6 Wis. 680.

(b) As to the remedy of injunction in the case of a *county*, see *County, &c. v. Hunt*, 5 Ohio, N. S. 488.

County commissioners, appointed by law to locate a county seat, located it at M., on condition that the citizens should furnish the buildings, which condition was complied with. The legislature then declared the location permanent, by joint resolution; but afterwards, by vote, changed the county seat. The citizens then claimed from the county commissioners, who retained possession of the buildings, the amount of money advanced for such buildings, with interest, which amount, without interest, the commissioners agreed to pay, on condition of release of all claims by the citizens. A release was made, and county orders issued, and, the board of commissioners being changed, a bill was filed to enjoin payment of orders on the new board. Held, that, after the county seat was removed, the county was morally obliged either to give up the property or make compensation. That perhaps chancery would have interfered in behalf of the defendants. But that the claim of the defendants was of that doubtful character in equity, which is sufficient ground for a compromise, and the court should

town voted to loan its portion of the surplus revenue, received under St. 1837, c. 85, "to the inhabitants of the town, as the population of the town was, on the head and the heads of families, to give their securities for themselves and minor children, guardians for children they are guardians for, and the selectmen for town paupers, and that the trustees of the surplus revenue in behalf of the town accept the securities of minor children, who have no parents or guardians." At a subsequent meeting, the town voted, that "the trustees of the surplus revenue loan the same in equal sums to each and every inhabitant of the town, and that each inhabitant give two sureties which should be acceptable to the trustees; that the loan be made according to a census to be taken, and that the trustees need not require one of the sureties to be a freeholder." Held, such votes were in violation of the act concerning the deposit of the surplus revenue passed March 24, 1837, and were illegal and void; and that compliance with such votes on the part of the trustees should be prohibited by injunction.¹ So a town have no authority to vote money for the purchase of uniforms for an artillery company; and will be restrained by injunction from paying the money, even after the officers of the company, upon the faith of an order drawn in their favor by the selectmen on the town treasurer, have purchased the uniforms and deposited them in the armory, to

¹ *Pope v. Halifax*, 12 Cush. 410. See *Hood v. Lynn*, 1 Allen, 103.

not interpose by injunction, to save the county from paying a bond which it was morally obliged to pay. 5 Ohio, N. S. 488.

It is laid down, as the general rule, that only the people can prosecute for violations of public trust. Municipal corporators and tax-payers, unless individually injured, cannot enjoin a public wrong. *Ketchum v. Buffalo*, 4 Kern. 356; *Davis v. Mayor, &c.*, *Ib.* 506. Equity will not interfere in behalf of a *monopoly*. Thus the amendment of a city charter provided, that a right given by the city to lay gas-pipes through the streets and public grounds should be exclusive except as against any persons or corporations that might receive similar authority from the legislature. The plaintiffs were purchasers of the gas-works and business. After such amendment, the defendants, organized under the statute relating to joint-stock corporations, commenced opening the streets to lay their pipes. Upon a bill praying an injunction, held, such amendment, so far as it restricted the free manufacture and sale of gas, was a monopoly, unconstitutional and void, and the injunction was refused. *Norwich, &c. v. Norwich, &c.*, 25 Conn. 19 (containing a learned and elaborate discussion of the law of franchises and monopolies).

be there kept as the property of the town.¹ So where the city of New London appropriated money for the celebration of the anniversary of independence ; a bill was sustained on behalf of certain tax-payers to restrain the payment of such appropriation. The court remarked : " The city corporation was in the nature of a trustee of the money in its treasury, for the corporators, the inhabitants of the city, for the purposes for which they were incorporated, and here was a meditated misappropriation of the trust fund ; and, secondly, it is extremely doubtful, whether the plaintiffs could have any other remedy. The amount appropriated by this vote, was in the city treasury; and, if abstracted, must, when wanted for other and legitimate purposes, be supplied by a tax on the inhabitants. It is suggested that the plaintiffs should bring an action against the city, for a misappropriation of its funds, or that, when such a tax is laid, they should, by a proper action, resist its collection. We are by no means prepared to say, that an action could be maintained, on either of these grounds, and are strongly inclined to think it could not. But, however this may be, we are clearly of opinion, that the plaintiffs are not bound to wait until the money is misspent, nor until such tax shall be levied, and attempted to be collected, but that they may call on a court of equity to interpose, by way of preventing the injury." ² But where an action was commenced against the selectmen of a town for illegally refusing a vote, and the town voted to pay the expenses already incurred in defending the suit, and that it would be the duty of the town to refund any sum which the selectmen should be compelled to pay, and a minority of the legal voters, who were liable to pay more than half the taxes of the town, filed a bill against the selectmen and treasurer, praying for an injunction to restrain them from carrying such vote into effect ; held, before the passage of (Massachusetts) St. 1847, c. 37, the court had no jurisdiction in the case.³

§ 16 a. By statute, the municipal corporation of New York were authorized to extend the Battery into the river, not ex-

¹ *Claffin v. Hopkinton*, 4 Gray, 502.

² *Hall v. Cushman*, 6 Met. 425.

³ *New London v. Brainard*, 22 Conn. 552-6.

ceeding 600 feet, the land to be used “for a public walk, and for erecting buildings and works of defence thereon, but without any power to dispose of the same for any other use or purpose whatever, and without any power of selling it or any part thereof.” The corporation having afterwards authorized the defendant to widen his adjoining field by encroachment upon this tract, an application was made in the name of the people for an injunction. Held, a grant by the city for any private use was, without reference to the question of nuisance, void, and the injunction should be ordered.¹

§ 16 b. Questions of the expediency and manner of grading the streets of a town, under (Ind.) 1 Rev. Sts. 1852, p. 482, which is a constitutional act, are left in the first instance to property holders and the trustees, and it is only in a case of palpable abuse, if then, that the Supreme Court will interfere.² The incidental formation of a *wharf* is no valid objection.³ And a city cannot be enjoined from changing the grade of a street, or making any alteration therein, causing consequential damage only to an adjoining proprietor, his property not being taken, although such damages have not been assessed and tendered.⁴ So, in New York, to authorize a preliminary injunction to stay the proceedings of the corporation of a city, in the alteration of streets, on the ground of fraud, the plaintiff should be able to point out some particular act of fraud, or *prima facie* evidence of corruption, on the part of the members of the corporation who voted for the ordinance.⁵

§ 17. In New York, chancery has power by injunction to restrain the trustees of a village from transcending their powers under the act of incorporation, where the act complained of would injuriously affect the value of property in the village.⁶

§ 18. A city cannot be enjoined from establishing and using land as a cemetery, on the ground that the drainage above

¹ *People v. Vanderbilt*, 38 Barb. 282.

² *Snyder v. Rockport*, 6 Ind. 237.

³ *Ib.*

⁴ *Lafayette v. Bush*, 19 Ind. 326.

⁵ *Champlin v. Corporation, &c.*, 3 Paige, 573.

⁶ *Oakley v. Trustees, &c.*, 6 Paige, 262.

and below the surface leads into a choice spring of the complainant, an adjoining owner; which will thus be rendered valueless by the proposed use of the land.¹

§ 19. It is held, that equity will enjoin the use of a district school-house for religious meetings and Sunday-schools by vote of the district, on the application of any tax-payer, however slightly injured.²

§ 20. The court will not restrain the mere act of voting on a resolution or ordinance, proposed in either board of the common council of a city, unless, on the mere voting or formal passage thereof, such ordinance or resolution would instantly, and without any action or attempt to enforce any right or privilege under it, effect an irremediable injury.³ And a *legislative act* cannot be enjoined; as, for instance, an order of a city common council to a department, to give an individual a particular contract. But the execution of such order by the city, after its passage, may be enjoined.⁴ And the like distinction is made, that although, generally, equity will not interfere with the ordinances of a municipal corporation, yet, where questions arose, as to the effect of a dedication of lands under water, and of letting the land lie unreclaimed fifty years by the public, and where the ordinance, based upon one view of the above questions, was about to do irreparable injury to the complainants, and the defendants did not object to the jurisdiction in their answer; an injunction was granted.⁵

§ 20 a. In a late case in Massachusetts, the defendants, a city, were temporarily enjoined from the erection of a new city hall; but, pending this injunction, the city government passed a legal vote in ratification of the former one, alleged to be informal and unauthorized, and thereupon the injunction was dissolved.⁶ (a)

¹ Greencastle v. Hazelett, 23 Ind. 186.

⁴ People v. New York, 32 Barb. 35.

² Schofield v. Eighth, &c., 27 Conn.

⁵ Morris, &c. v. Jersey, &c., 1 Beal.

499. See Sheldon v. Centre, &c., 25 Conn. 224.

252. ⁶ Kettell v. Charlestown, S. J. C.,

³ Whitney v. Mayor, &c., 28 Barb. 233.

Suffolk, June, 1868.

(a) In another recent case in the same court, violation of an ordinance was

§ 21. Where an injunction issues against a city, and all its members, officers, and agents, restraining them from making a certain grant ; a member of the city council who votes for the grant violates the injunction, though the resolve, in favor of the grant, is conditioned on a grantee's acceptance of its terms.¹

§ 22. The question of property and right of possession, between two bodies, each claiming to be the trustees of an incorporated *religious society*, is a question to be determined at law. Thus a part of a religious society, which owned a house of public worship and burial-ground, built a new house, in another place, and elected a board of trustees. A part continued to worship in the old building. The trustees of those who worshipped at the old house refused to permit the new party to enter and use the burying-ground ; and the latter, on several occasions, broke open the gates for the purpose of burying therein. On bill filed, injunction was granted, restraining such forcible entry. On answer and argument, the court held that a forcible entry for such a purpose was not such an injury as called for injunction.² So persons claiming to be trustees of a church, but not having been admitted to the exercise of any of their rights and duties, neither being in possession of the building or any temporalities of the church, and whose office is disputed and denied, cannot maintain an action as such trustees, to restrain other persons, also claiming to be trustees, who are in possession, and have been duly elected, from closing the edifice, excluding the pastor, &c. It is a case for the attorney-general.³ So an injunction will not be granted, at the suit of a pew-holder, to prevent the trustees of a church from pulling down the old church, where it has become dilapidated, for the purpose of erecting a new one, but will leave the pew-holders to their remedies at law.⁴ So, on a bill filed by pew-holders in a church, an injunction

¹ *People v. Sturtevant*, 5 Seld. 263.

² *North Baptist Church v. Parker*, 36

³ *Miller v. English*, 2 Halst. Ch. 304. Barb. 171.

See *Scott v. Stipe*, 12 Ind. 74.

⁴ *Heeney v. St. Peter's Church*, 2 Edw. Ch. 608.

enjoined, and a vote then passed authorizing the act complained of. A motion was thereupon made to dissolve the injunction. *Senther v. Broadway, &c.*, Mass. S. J. C., Suffolk, August, 1868.

was granted, restraining the authorities of the church from pulling it down, as they were proposing to use the materials in the erection of a new church on a different site. On answer, the injunction was dissolved, on the ground that, if the complainants had rights which would be violated, there was a remedy at law, and that the nature and extent of the injury were not such as called for an injunction.¹ So if the trustees of a church intrude upon the offices of minister or stewards, the male members of the congregation cannot interfere by injunction; mandamus is the proper remedy.² So land, belonging originally to the city of New York in fee-simple, was leased in perpetuity, at a small rent, to the officers of a religious corporation, for the purposes of a church and church-yard, and subject to forfeiture should the parties apply or convert it to private or secular uses. By a city ordinance, passed in 1844, authority was given to the commissioners of the sinking fund "to sell and dispose of all real estate belonging to the corporation, and not in use for, or reserved for public purposes." Held, this tract was not within the exception, being occupied by a certain denomination for their own exclusive benefit, and the city's interest was embraced in a power to sell "all real estate." Also, that the commissioners had no power to release to the purchaser of the tract the condition on which it was held by the church, and the attempt to bind the corporation to such release, as it affected only the purchaser, furnished no ground for injunction. Also, that the interest of the trustees was a vendible title, and the law will intend, till overt act to the contrary, that the purchasers of that title contemplate either a continued devotion of the premises to the purposes of public worship, or a dispensation from such observance, duly obtained from the city council. Also, that, should the purchaser treat that dispensation as unnecessary, and convert the premises immediately to secular purposes, and thereby incur the forfeiture provided in the grant; that would furnish no ground for injunction, since the enforcement of the penalty for such violation of the condition would be a benefit rather than injury to the tax-payers.³

¹ *Van Horn v. Tallmadge*, 4 Halst. Ch. 108.

² *Arkenburgh v. Wood*, 23 Barb. 360.

³ *Tartar v. Gibbs*, 24 Md. 337.

§ 22 a. Other cases, however, recognize the remedy of injunction, in reference to churches and religious societies.¹

§ 22 b. Whenever the trustees of a religious society, organized under the (Ill.) general law concerning their incorporation, do any act which obstructs the enjoyment of the property for the purposes and the mode authorized by the usages of the church as an organized body, they are guilty of a violation of the trust, which, as in other cases of trust, will be corrected by a court of chancery. So, although a *mandamus* might lie, or though the statute has authorized the members of the church to remove the refractory trustees and elect others. Hence an injunction lies, where the trustees, by direction of a minority of the members, close the church edifice against their minister and those disposed to attend upon his ministrations, and contrary to the wish of a majority of the members. So, although the particular act of closing the church was already done. It was not like a simple act of trespass, but was a continuing act, designed to deprive the members of the church and their pastor of their rights in the future as well as in the past.² So a religious corporation, whose power to sell its real estate depends upon the consent of the Supreme Court, has no authority to refer the question of sale to arbitrators; and if the corporation so refer the question, and the arbitrator awards in favor of a sale, no corporator is bound by the award; and, if the award is confirmed by the court, and a majority of the corporators are opposed to the sale, an injunction will be granted to stay the sale.³ (Individual corporators in a religious corporation are not bound by a submission, on the part of the corporation, to arbitrators, of the question, who were the legally elected trustees of the corporation; and, notwithstanding an award, that the trustees acting are well and truly elected, any number of the corporators may call in question their right to act as trustees.⁴ Application for leave to sell real estate of a religious corporation must be made to the (N. Y.) Supreme

¹ See *Atty.-Gen. v. Welsh*, 4 Hare (30 Eng. Cha.), 572.

² *Brunnenmeyer v. Buhre*, 32 Ill. 183.

³ *Wyatt v. Benson*, 23 Barb. 327.

⁴ *Ib.*

Court (since the constitution of 1846), and by the corporation; and, if the court give an order for sale on application of a majority of the board of trustees, not sanctioned by a majority of the corporators, and that order has not been executed, so that the rights of third parties are not affected; the court have power and ought to revoke the order.¹) So, land having been conveyed to the defendants, trustees of a religious society, for the use of such society, according to the discipline, &c.; the society erected a church thereon, the basement of which was made for a prayer-room; and the defendants leased the basement to the teacher of a common day-school, with permission to make the changes in the room suitable for such purpose. Held, the plaintiffs, members of the society, might have an injunction against such leasing.²

§ 22 c. The following case, as stated, in substance, by Judge Story, in his animated and eloquent judgment, was determined in the Supreme Court of the United States.

§ 22 d. "The bill was brought by the original plaintiffs, alleging themselves to be trustees and agents for the German Lutheran Church composed of the members of the German Lutheran Church of Georgetown, in behalf of themselves and the members of the said church. It charges the laying out of the lot in question for the sole use and benefit of the Lutheran Church, to be held by them for religious purposes. That soon afterwards the lot was taken possession of by the said German Lutherans; who organized themselves into a church, and erected a church or house of worship thereon; and hath been kept and held by them during a period of fifty years; and hath been used as a burying-ground, with the avowed intention of building thereon another church, the first building being decayed, whenever their funds would enable them so to do. That their possession has never been questioned, and the lot has been exempted from taxation as property set apart for a religious purpose. That a committee and trustees were appointed to take care of the said church," the plaintiffs being so appointed. "That Charles Beatty" (former

¹ Wyatt v. Benson, 23 Barb. 327.

² Perry v. M'Ewen, 22 Ind. 440.

owner of the land) “died about sixteen years ago without having made any conveyance, and that Charles A. Beatty, the defendant, is his heir. That Ritchie, the other defendant, has unwarrantably disputed their title; and has entered upon the lot and removed some of the tombstones, and means to dispossess the plaintiff, and to remove the tombstones and graves. The bill therefore prays that a writ of injunction may issue. The material allegations are established: That shortly after the appropriation, and more than fifty years ago, the Lutherans of Georgetown proceeded to erect a log house on the lot, which was used as a church, and was also occasionally, and at different times since, used as a school-house under their direction; that at a much later period, a steeple and bell were added; that the land was used as a church-yard; that more than one half the lot is covered with graves; that the possession was never questioned by Charles Beatty, or in any manner disturbed until a short period before the commencement of the present suit. The house, in consequence of inevitable decay, fell down some time ago; it seems to have been more than forty years after its first erection. Efforts have since been made to rebuild it, but hitherto they have not been successful. The defendant, Beatty, has, since the decease of his father, repeatedly admitted the claim of the Lutherans to the lot, and his willingness that it should remain for them, as it had been originally appropriated.” Upon these facts the court held, that, at the time of the appropriation of the lot, there was no grantee capable of taking, nor could any presumption of a grant arise from lapse of time, there never having been any incorporated church, and the town not being a corporation at the time. But that the appropriation should be sustained, as a dedication of the lot to public and pious uses, rendered valid by the bill of rights of Maryland, which recognized the doctrines of the statute of Elizabeth, relating to charities. Judge Story closes his opinion, in favor of an injunction, as follows: “No action at law would afford an adequate and complete remedy. This is not the case of a mere private trespass; but a public nuisance, going to the irreparable injury of the Georgetown congregation of Lutherans. The property consecrated to their use by

a perpetual servitude or easement, is to be taken from them; the sepulchres of the dead are to be violated; the feelings of religion, and the sentiment of natural affection of the kindred and friends of the deceased are to be wounded; and the memorials erected by piety or love, to the memory of the good, are to be removed, so as to leave no trace of the last home of their ancestry to those who may visit the spot in future generations. It cannot be that such acts are to be redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery; operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living.”¹ (a)

¹ Beatty v. Kurtz, 2 Pet. 566, 579, 581, 584.

(a) In a similar rhetorical vein — not usually enlivening the dulness of law reports and judicial opinions — are the remarks of Mr. Justice Hoar, in the case of *Com. v. Viatt*, 2 Allen, 515, being an indictment for cutting down trees in a public burial-ground. “Although it has been said that the Puritan founders of our Commonwealth, — conducted funeral services with an austere simplicity, and often chose the most bleak and barren spots as their places of sepulture, yet the whole sentiment of the community has long since changed in this respect; and the refinements introduced by modern taste, have commended themselves to the general approbation. — The growth of these trees may have been watched with affectionate interest by friends and relatives of the departed, whose last resting-place has been made more pleasant to the imagination of the survivors by the thought that it might become a resort of birds, and a place for wild flowers to grow; that waving boughs would shelter it from summer heat, and protect it from the bleak winds of the ocean.” In another recent case, *Mayor v. Society, Leg. Intel.* (Philadelphia), being a motion for injunction; the facts sufficiently appear from the opinion of Sharswood, J. “By the constitution of this society in its original form, though primarily it was merely a beneficial society ‘for the visitation and assistance of its members in case of sickness; their burial in case of death; and the assistance of the families of deceased members,’ yet there was a provision which it seemed to me stamped it with the character of a charity. It declared that the society should never be dissolved, but that after the decease of all the members, the property of the society shall be transferred to the oldest Jewish congregation in the city and county of Philadelphia for a due administration, and the interest arising therefrom be expended ‘for the relief of Jewish poor.’ It is averred by the bill and sworn to by the affidavit that the corporation has resolved to dissolve, sell its burial-ground, and divide all its assets among its members. This would certainly be a clear violation of the trust, upon which its property has been received from the donors. The contributions of its members have been made not merely on the footing of mutual assistance in case of sickness, of burial after death, and assistance to the families of deceased members, which would not be a charity in the legal sense of that word, but the ultimate destination of it for the Jewish poor and the designation of a trustee brings it

§ 22 e. The remedy of injunction has been sometimes applied in the case of *public schools*.

§ 22 f. In New Hampshire, one who has kept a district school, in pursuance of a contract with the prudential committee, but who has not produced a certificate of the superintending committee, required by law, cannot recover any compensation. A district has no authority to waive this provision of law, and a judgment against the district, for such compensation, by its consent, will be restrained by injunction, at the suit of any tax-payer, suing in behalf of himself and others.¹

§ 22 g. Where land has been dedicated, by the owner, for a burial-place and a school-house lot, and the school directors are about to rebuild the school-house; the heir of the donor, not being a resident of the town, has no interest such as authorizes him to interfere by injunction. The courts would interfere, to prevent any encroachment upon the burial-place. But the building of a new school-house upon the portion of the lot dedicated for school purposes is not such an encroachment; hence, the directors had the right to rebuild, and the decree of the court below, restraining them, was error.²

¹ *Barr v. Deniston*, 19 N. H. 170.

² *Pott v. School Directors*, 42 Penn. 132.

strictly within every definition of that term. There were no counter affidavits, but it was suggested *ore tenus* at the hearing, that an amendment of the charter had been obtained changing these provisions, and a printed pamphlet has been handed to me which for the purpose of this motion I will assume to be in evidence. This, however, does not purport to be an amendment to the charter, but an entirely new charter for a corporation of the same name. In this charter it is indeed declared that the society may be dissolved, if three fourths of the members present at a special meeting called for that purpose shall be in favor of such dissolution, and that in case of such dissolution, the assets of the society shall be equally divided among the members. I very much doubt whether the Court of Common Pleas would have approved of this article, if it had been presented to them as an amendment of the original charter. They might very well pass it as part of the constitution of a new corporation. On the case as now presented I do not think it affords any answer to the application. I shall, therefore, award a special injunction enjoining the defendants from making sale of the burial-ground and from making any division of the assets of the society, until the further order of the court, upon the plaintiffs giving bond with two sufficient sureties to be approved by the court in the sum of five hundred dollars, pursuant to the provisions of the act of May 6, 1844."

§ 23. The process of injunction is very frequently applied in connection with *banking corporations*; which, from the peculiar nature of their relations with the community at large, and the unforeseen fluctuations incident to them, often call for judicial interference more prompt and summary than could otherwise be afforded.¹ In reference to a statutory provision for the issuing of an injunction against a bank upon the application of bank commissioners, Chief Justice Shaw remarks: "An injunction is often issued in other cases, upon affidavit before hearing or notice. But such a complaint, from responsible officers, is fully as much entitled to credit as an affidavit. It is in some measure like an inquisition, somewhat like an indictment, but perhaps still more like an information, all of which are known forms of proceeding to put a party on trial. Again, here is room for the exercise of judicial powers. The judge is judicially to inquire and ascertain that the complainants are such bank commissioners; that they have examined the bank complained against in the manner required by the statute; that they have come to the opinion, that the bank is insolvent, and that its condition is such, that its further proceeding is dangerous to the public, and that it has violated its charter, and also, that they have made application in such form and manner as the law requires. There is also room for the exercise of judicial discretion, in determining upon the complaint, to what extent such injunction shall go, whether to prevent their issuing bills only, or to prevent their paying bills, or deposits, or other debts; in short, whether it shall be a total suspension of all their operations, or a slight interference with them."² And in a very recent similar case it is said, the authority of this court to issue an injunction against a bank on the application of the bank commissioners, and to make such injunction perpetual, as set forth in Gen. Sts. c. 57, § 7, is very broad and comprehensive. It is not limited to cases where the corporation is insolvent, or its further continuance in business will be hazardous to its creditors, but extends to all cases where a bank has exceeded the powers conferred on it, or has failed to comply with any of the rules, restrictions,

¹ See *Lund v. Blanshard*, 4 Hare (30 Eng. Cha.), 9.

² *Com. v. Farmers', &c.*, 21 Pick. 552.

or conditions, provided by law for its regulation and management; nor is the nature of the injunction defined or limited by any legislative restriction. This is left to be determined by a sound judicial discretion. The object of conferring this very extensive jurisdiction in equity over this class of corporations is obvious. The nature of the important powers and duties with which they are intrusted, renders it expedient and necessary that they should be subjected to careful supervision, and that any irregularity or illegality in their mode of conducting business should be promptly checked and prevented.¹ Accordingly it was held, that there should be an injunction against a bank, for not keeping on hand an amount of specie equal to fifteen per cent. of its liability for circulation and deposits, under Gen. Sts. c. 57, § 19. But it was further held, that, if a bank has violated the provisions of a statute under a mistake or misapprehension of the law, and with no wilful intent of violation, and it is not alleged that any other or further like acts are threatened or intended, a temporary injunction may be dissolved on payment of costs.² So, by the charter of a bank, a majority of the directors, the president being one, were to form a board or quorum for the transaction of any business, "but ordinary discounts may be made by the president and four directors." "The rate of discount shall not exceed one half of one per centum for thirty days." The cashier and president discounted paper without four directors, and paper was discounted at a higher rate than that above stated. Held, a temporary injunction should be granted against the bank.³

§ 24. In Pennsylvania, the Commonwealth filed a bill against a bank, alleging that the bank held funds of the Commonwealth in trust, and had misapplied large portions thereof, and praying an injunction against a further misapplication. An injunction was granted after notice and without objection. Afterwards the bank was allowed to pay the funds to the use of the complainant, and the current expenses of the bank, without prejudice. The respondents answered, denying that

¹ Per Bigelow, C. J., *Com. v. Bank*,
&c., 4 Allen, 8, 9.

² *Manderson v. Commercial, &c.*, 28
Penn. 379.

³ *Com. v. Bank, &c.*, 4 Allen, 1.

they were trustees, and that they received the funds otherwise than as ordinary deposits; answering the residue of the bill; and praying that the injunction might be dissolved. A statute was then passed, authorizing the bank to make an assignment, the assignment to be approved by the stockholders, with a proviso that the Commonwealth should have the right to vote in the choice of assignees, according to the number of shares held by her. The statute also prescribed the powers and duties of the assignees, and that the assignment should not be made until the debt due the Commonwealth had been paid. The stockholders voted to assign, and chose assignees; but the election was declared void by the Supreme Court for defects in the proviso as to the number of votes by the Commonwealth. Held, that the residue of the statute was valid and in full force, by which the priority of the Commonwealth was secured, and that the injunction ought not to be dissolved.¹ But an injunction to restrain persons from carrying on the business of banking, in contravention of a statute of New York, on an information by the attorney-general, was refused by the court.² And an affidavit of information and belief of the insolvency of a bank, in contradiction of its official reports, and its suspension of specie payments, in common with other banks, are not sufficient grounds for a temporary injunction, on the charge of insolvency.³ (a)

¹ Com. v. Bank, &c., 3 Watts & Serg. 184.

³ Livingston v. Bank, &c., 26 Barb. 304.

² Attorney, &c. v. Utica, &c., 2 John. Ch. 371.

(a) In a suit brought by the Bank of Turkey against the Ottoman Company, a limited company, having voluntarily wound up, upon the ground that a payment for *promotion money* made by the bank directors to the company, was a breach of trust; the right to such money being the question in issue, and no trust being admitted, which would authorize an order for payment of the money into court: held, the court would not by interlocutory injunction restrain the defendants from dealing with the money or dissolving the company. Sir W. Paigé Wood, V. C., remarked, "The jurisdiction thus invoked is totally novel. A court of law has no such jurisdiction.—Where proceedings have been commenced at law, and this court is asked to interpose in consequence of there being a right to be tried here, the legal right is admitted, and the court, if it thinks there is an equitable right to be tried, will stay the proceedings at law upon payment of the money into court, or upon having judgment given." *Bank, &c. v. Ottoman Co.*, Law Rep. (Eng.) Eq., August, 1866, pp. 364, 368.

§ 25. Where a lien and power of sale upon and over the shares are given by charter to a bank, for debts due from the stockholders to the bank, equity will enjoin a sale, or, under equitable circumstances, set aside a conveyance, of shares, attempted or made by the bank against the will of an insolvent stockholder, for a debt really due to a director, under color that it is due to the bank; such sale being a fraudulent abuse of a statute power, and a fraudulent attempt without the authority of the stockholder to give preference amongst his creditors.¹

§ 26. In a proceeding against a bank, its attorneys, &c., to enjoin the collection of a judgment in its favor, service was had on the attorney of the bank who had obtained the judgment and was endeavoring to collect it. Held, not to be sufficient to give the court jurisdiction to order a perpetual injunction; and this notwithstanding the bank was a foreign corporation, there being at the time other legal means by which jurisdiction over the defendants for the purposes required could be obtained.²

§ 27. A stockholder of a bank having filed a bill, to compel the president and directors to re-transfer to the bank certain shares, which the bank itself had owned, and which the defendants had sold and purchased at less, as was alleged, than the market value; held, the corporation should have been made a party to the bill.³

§ 27 a. The deed of settlement of a joint-stock banking company provided, that, on an intended transfer of shares, notice should be given to the company, and then the directors would be bound either to purchase the shares, or grant their consent to the intended transfer, and that no one should become a shareholder without this consent in the form of a certificate, signed by three directors. The directors from the first, *i. e.*, for ten years, never gave this certificate of consent

¹ *Seagraves v. Railroad Bank*, 4 R. I. 372.

² *Charleston, &c. v. Sebring*, 5 Rich. Eq. 342.

³ *Death v. Bank, &c.*, 1 Clarke, 382.

to any transfer ; but the managing director on the spot merely gave a verbal consent to the vendor's broker, and about nine tenths of the original shares had been transferred in this informal way. S. having transferred his shares to T. in the same mode, and T.'s name having been entered, as the proprietor, and T. treated as such by the company, the board of directors afterwards cancelled the entry of T.'s name in their share register book, on the ground that the consent of the directors was not given according to the deed. S. then filed a bill in equity, praying a declaration that he had ceased to be a shareholder, and an injunction against an action of *scire facias* sued out against him by a creditor of the company. Held (Lord Cranworth, Lord Chancellor, dissenting), that S. had ceased to be a shareholder, and was entitled to the injunction, for that the company could not take advantage of the informality in the transfer, their course of dealing having been universal and for their own benefit.¹

§ 28. A board of freeholders in New Jersey being authorized by statute to build a *bridge* over a certain river, chancery cannot interfere in respect to their acts in relation to the bridge, on the ground that they are arbitrary, or that the complainants have been denied a fair hearing. The remedy is by application to the Supreme Court for a *certiorari*.²

§ 29. On application for a preliminary injunction, to stay the first election of officers under an act of incorporation, on the ground that the apportionment of stock by the commissioners was void ; it appearing that an injunction would affect the interests of many who had purchased stock in good faith, and it being doubtful whether the commissioners could fix upon another day for the election, if not held at the time appointed, the injunction was denied.³

§ 30. A corporation may recover the amount of a subscription to its stock, notwithstanding a temporary injunction against proceeding with its works.⁴

¹ *Bargate v. Shortridge*, 31 Eng. L. & Eq. 44.

² *Tucker v. Freeholders, &c., Saxt.* 282.

³ *Walker v. Devereaux*, 4 Paige, 229.

⁴ *Crossman v. Penrose, &c.*, 26 Penn. 69.

§ 31. Service of the notice of motion at the office in London is, for the purposes of the corporation, a good service, where it is admitted that at the head office in Scotland the corporation had notice.¹

§ 32. The Supreme Court of Pennsylvania has not jurisdiction to grant an injunction against a corporation situated in Montgomery County; their supervision of corporations is among that class of cases in which their jurisdiction is limited to the city and county of Philadelphia.² (a)

¹ *McLairon v. Stainton*, 15 Eng. Law & Eq. 500.

² *Cassel v. Jones*, 6 Watts & Serg. 552.

(a) We have already (Chapter III.) referred to the rights and duties of corporations in regard to the dissolution of an injunction. The following remarks of eminent judges, expressing the judgments of courts of alike high authority, may properly be cited, as directly opposite views of an important point of practice. "I am strongly of opinion, upon principle, that such an answer (an answer under the corporate seal) is sufficient to produce either of the consequences which have been mentioned. The corporate body is called upon, and is compellable, to answer all the allegations of the bill, but can do so under no higher sanction than its common seal. A peer of the realm in England answers upon his honor, the oath being dispensed with. In like manner, the plaintiff may, in ordinary cases, dispense with the oath to an answer; and, if he do so, the court will order the answer to be taken without oath. Now if, in these cases, the answer, denying the equity of the bill, cannot avail the defendant as an answer under oath would do, to prevent the granting of an injunction, or to dissolve it when granted, the legal impossibility to take an oath in the first case, the privilege of the peer in the second, and the dispensation extended to the defendant in the last, would place each of those defendants in a situation infinitely more disadvantageous than that of the other defendants, whose answers cannot be received otherwise than upon oath. Such then cannot be the practice of a court of equity." Per Washington, J., *Haight v. Proprs., &c.*, 4 Wash. C. 601. On the other hand, in a case in New York, the chancellor remarked as follows "The case of a corporation defendant is an anomaly in the practice in relation to the dissolution of an injunction. In most cases the injunction is dissolved as a matter of course, if the answer is perfect, and denies all the equity of the bill in the points upon which the injunction rests. It is not, however, a matter of course, to dissolve the injunction where the defendant acts in a representative character, and founds his denial of the equity of the bill upon information and belief only. Corporations answer under their seal and without oath. They are therefore at liberty to deny everything contained in the bill whether true or false. Neither can any discovery be compelled, except through the medium of their agents and officers and by making them parties defendants. But no dissolution of the injunction can be obtained upon the answer of a corporation, which is not duly verified by the oath of some officer of the corporation, or other person who is acquainted

with the facts contained therein. There can be no hardship in this rule as applied to corporations, as it only puts them in the same situation with other parties. Other defendants can only make positive denial as to facts within their own knowledge. In relation to every other matter, they must answer as to information and belief. If the agents of the institution, under whose direction the answer is put in, are acquainted with the facts, so as to justify a positive denial in the answer, they can verify its truth by a positive affidavit; and if none of the officers are acquainted with the facts, their information and belief can have no greater effect than that of ordinary defendants, however positive the answer in the denial may be. In this case, the officer of the institution, who was such at the time referred to in the claimant's bill, has studiously avoided saying anything as to the truth of the answer, leaving it to the secretary, who knows nothing of its truth or falsehood, to express his belief on the subject." *Fulton, &c. v. New York, &c.*, 1 Paige, 311.

"Parties who have undertaken to set aside and usurp the place of a previously existing *de facto* corporate organization which they found in the peaceable possession of the property and the undisturbed exercise of the functions of the corporation, must be held to prove strictly the regularity of the proceedings under which they act." Per Foster, J. *Reformed, &c. v. Draper*, 97 Mass. (1 Browne) 352. Upon this ground, a *de facto* religious organization, in such peaceable possession and exercise, may enjoin from taking possession of the property another organization claiming to be legal, but effected at a meeting which was not called in compliance with the statutory law. *Ib.* 349.

CHAPTER XVI.

EXECUTORS AND ADMINISTRATORS.

1. General administration, &c., of assets.
2. Injunction against an executor, &c.
4. Injunction in favor of an executor, &c.
9. Miscellaneous cases as to estates of persons deceased.

§ 1. THE interference of equity “in the *administration and marshalling of assets*” is said to rest “upon principles almost purely of an equitable and conscientious nature. In most of the cases of this nature, there is no pretence to assert the jurisdiction upon any of the ordinary grounds of accident, (a)

(a) Accident, however, may furnish additional and special ground for the interference of equity in this class of cases. The same learned writer elsewhere says: “Suppose an executor or administrator should be in possession of abundant assets to pay all the debts of the deceased, and by an accidental fire a great portion of them should be destroyed, so that the estate should be deeply insolvent. In such a case he might be sued by a creditor at law, and the loss of the assets by accident would be no defence; for when he once becomes chargeable with the assets at law, he is forever chargeable, notwithstanding any intervening casualties. But courts of equity will enjoin proceedings at law in cases of this sort upon the purest principles of justice.” 2 Story’s Eq. 196, § 878. Accordingly, in an early case, an administrator, who had committed a *devastavit* at law by paying legacies, was relieved against a bond which unexpectedly started up, the assets having been originally sufficient, but the greatest part of them, consisting of houses, having been burned in the fire of London. *Croft v. Lindsey*, 2 Freem. 1. In another case, the rigid rule of law upon this subject is thus set forth: “As no case at law has yet decided that an executor once become fully responsible by actual receipt of a part of his testator’s property for the due administration thereof, can found his discharge in respect thereof, as against a creditor seeking satisfaction out of the testator’s assets, either on the score of inevitable accident, as destruction by fire, loss by robbery, or the like, or reasonable confidence disappointed, or loss by any of the various means which afford excuse to ordinary agents and bailees in case of loss without any negligence on their part; — we are not, from the particular hardship of the present case” (in which the defendant had paid over the money to his co-executor for the express purpose of satisfying the plaintiff’s debt), authorized to make such a precedent.” Per Lord Ellenborough, C. J., *Crosse v. Smith*, 7 E. 257. It is truly remarked, “The jurisdiction of courts of equity in cases of this kind arises from their

mistake, fraud, or confidence. It stands upon the more enlarged principles of general justice, and was probably derived from that great reservoir of general principles, the Roman civil law."¹ (a) Thus equity will restrain the Orphans' Court from proceeding in the final settlement of an estate, where matters of purely equitable cognizance are to be adjudicated, or where a discovery is necessary to ascertain facts, which cannot be established otherwise.² So, in a suit by one or more creditors against an executor, &c., either separately, for themselves, or specially for other creditors also; the usual decree to account is for the benefit and in the nature of a judgment for all, who are entitled, and for that purpose should be notified, to come in and prove before the master. From the date of such decree, and on due disclosure of assets, an injunction will be granted, on motion of either party, to stay proceedings at law.³ So after decree for an administration of assets, the court will on motion, without a fresh suit, enjoin a creditor from suing at law.⁴

§ 2. A suit brought by an administrator, for the sole benefit of persons neither parties nor privies, and having no title themselves, in order to enable them to use the intestate's title against the tenant in possession, will be enjoined.⁵ So an injunction lies against an executor, to prevent his paying a distributive share, on the application of a creditor of the

¹ 2 Story, Eq. 199, § 884. See Atkinson v. Henshaw, 2 Ves. & B. 85; Ball v. Oliver, Ib. 96; King v. King, 6 Ves. 172; Goate v. Fryer, 3 Bro. Ch. 23.

² Thompson v. Brown, 4 John. Ch. 619.

³ Paxton v. Douglass, 8 Ves. 520; Clarke v. Ormond, 1 Jac. 122.

⁴ Pierce v. Jones, 23 Geo. 374.

⁵ Horton v. Moseley, 17 Ala. 794.

general jurisdiction over trusts, which cannot be taken away but by express legislation. The special power given to surrogates' courts, in these cases, is merely auxiliary to that of the Supreme Court," now (in New York) having full chancery jurisdiction. Will. Eq. 368. The Court of Common Pleas (in Pennsylvania) cannot enjoin an executor from selling real estate under an order of the Orphans' Court. "The Orphans' Court is, of itself, a court of equity. It sits as a court of equity, and, in a rude way, uses the forms of a court of equity when it orders land to be sold for the payment of debts." Loomis v. Loomis, 27 Penn. 233, 236, per Lowrie, J.

(a) Equity will not enjoin an execution, issued after the death of the plaintiff in the name of his administrator, without a *scire facias*. Ammons v. Whitehead, 31 Miss. 99.

distributee (even though no judgment has been obtained) who is hopelessly insolvent.¹ So where an administrator sells property, at auction as belonging to his intestate, and recovers judgment on the bond given for his purchase-money ; and the son of the intestate, claiming the property by gift, threatens to sue for it : equity will prevent the suit by injunction, as the parties are now all before the court, and full justice can be done them ; and it will also prevent the administrator from taking out execution, until the title is ascertained, or the purchaser indemnified.² So where A, an administrator, permitted property to go into possession of B, a distributee, before all the debts were paid, upon condition that he should give a refunding bond ; and the latter sold it to C without giving the bond ; and trover was brought by A, against C, and recovery had for the value of the property : in a bill by C, to enjoin the collection of this judgment for all beyond B's share of the unpaid debts, held, his liability was that which would have existed against B on his bond, had he given one, and A should be restrained by injunction from collecting anything beyond that sum.³ So equity has jurisdiction, in a suit brought against an executor, in which the plaintiff claims that a devise to him operated to discharge a debt due by him to the testator, and prays that the defendant be enjoined from prosecuting such debt.⁴ So where a party claimed to be executor and universal legatee under a will, proved the will, took possession of a considerable part of the effects, and threatened to take the whole ; A, one of the executors, under a shortly subsequent and revoking will, with B and C, filed a bill in equity to enjoin such taking possession, and to stay the trial of actions brought by the defendant against debtors to the estate, including A, B, and C. Per vice-chancellor: "As you state the defendant is insolvent, you have shown a case where irreparable mischief may ensue, and, under the circumstances, take your motion, upon paying into court the money sought to be recovered by the actions."⁵ So where the testator devised to his executors for the payment of debts ; on a

¹ *Lawson v. Virgin*, 21 Geo. 356.

² *Curtis v. Hartsfield*, 1 Car. L. R. 87.
501.

³ *Johnston v. Howell*, 4 Jones, Eq

⁴ *Holmes v. Holmes*, 36 Vt. 525.

⁵ *Mansfield v. Shaw*, 3 Madd. 60.

bill by some of the creditors, stating that the executor refused to execute the trust, and that he threatened to prefer certain of the creditors, having no claim to such preference, he was enjoined from selling, except under the direction of the court.¹ So an insolvent gave to A and B, his sureties in a guardian's bond, a note for the amount of a deficiency in his guardian's account. They sued the note, and obtained judgment and execution, which was satisfied in part by a levy upon real estate, set off to them jointly. B having paid the deficiency, and continued in possession of the whole estate, in person, or by his grantee; held, he was entitled to an injunction against the executors of A, to restrain them from selling their testator's legal estate in the premises, unless they shall have accounted with B on such terms as the court may direct.² So where an administrator in one State, without settlement of his administration, brings the property, or a part of it, into another, in fraud of the rights of creditors and distributees; chancery will hold him to account as a trustee, and compel him, at the instance of either creditor or distributee, to surrender the trust estate.³ So A, an administrator, recovered a judgment against B, a distributee, for \$3,000. B filed a bill to enjoin the sale of his property under the judgment, in which it was averred that there were funds in the hands of A coming to him, amounting to \$5,000; that A had held possession of the estate six or seven years, and was believed to be insolvent; but not that the securities to the administration bond were involved. Held, the bill could not be dismissed upon demurrer, but the injunction must be retained till a hearing thereon.⁴ So one in possession of land, under a purchase at a sale on execution against a deceased person, may maintain a bill to enjoin proceedings in the Probate Court, instituted by the administrator for the sale of the land for payment of debts barred by the statute of limitations, or by the widow to obtain dower, when more than sixteen years have elapsed since the death of her husband.⁵

§ 3. But on a bill charging executors with having con-

¹ *Depan v. Moses*, 3 John. Ch. 349.

² *Brooks v. Fowle*, 14 N. H. 248.

³ *Patton v. Overton*, 8 Humph. 192.

⁴ *Carter v. McMichael*, 20 Geo. 96.

⁵ *Moody v. Harper*, 38 Miss. 599.

verted a part of the estate to their own use, with being insolvent, and being about to sell real estate in a manner forbidden by the will, &c., an injunction was granted restraining the sale. The executors answered, explaining their conduct, and moved that the injunction be dissolved; and it was dissolved.¹ So where a creditor, in a suit at law against the administrator of his debtor, relied upon the account of sales of the administrator as evidence of the assets, and a fair trial was had; held, he was bound by the verdict, unless he could show that the administrator had deceived him by fraudulent representations, and that he could not come into equity to avoid a sale by the administrator, on the ground that he was himself the beneficial purchaser, and that he purchased at an under price.² So a bill for an injunction to prevent an executor from interfering in any way with a trust estate, containing no prayer for the appointment of a receiver, cannot be sustained.³ And the allegations, that the complainants have just cause to fear, and do fear, the defendants will remove certain property bequeathed by a will alleged to be void, will not confer jurisdiction on a court of equity, in the absence of allegations that the complainants have applied, or intend to apply for administration.⁴ So where a temporary injunction had been granted, and a perpetual injunction was prayed for, against executors, who had failed to file an inventory of personal property, and were wasting the estate; but the surrogate had obliged them to give security, until the inventory should be filed, and against wasting the estate: held, the surrogate had full power to prevent waste, and, as he had exercised it as far as he thought proper, equity would not interfere. The temporary injunction was dissolved.⁵ So where a slave was sold by an administrator, by order of court, to effect division of an estate; it was held, that chancery would not enjoin against the collection of the purchase-money, notwithstanding the seller said he believed the girl was sound, and it appeared in evidence that she had been sick for a year before the sale, and died about a year after the sale, having

¹ *Schanck v. Schanck*, 3 Halst. Ch. 140.

² *Wilson v. Leigh*, 4 Ired. Eq. 97.

³ *Boyd v. Murray*, 3 John. Ch. 48.

⁴ *Watson v. Bothwell*, 11 Ala. 650.

⁵ *Whitney v. Munro*, 4 Edw. Ch. 5.

been under the influence of a fatal disease the whole time.¹ So the laches of an executor is no ground for injunction.² So where the defendant, against whom a decree is rendered in favor of an administrator, for money due his intestate, is notified by the representatives, that the complainant has ceased to be administrator, and has no right to collect the money; if the defendant has good ground to believe that it would be unsafe to pay it over to him, his proper course is to file a bill in the nature of a bill of interpleader, and bring the money into court; but, if he file a bill to enjoin the execution of the decree, retain the money in his own hands, and upon final hearing produce no evidence to sustain the material allegations of his bill, and they are denied by the answer, the court must, under the statute, award damages on the dissolution of the injunction.³ So an administratrix loaned money belonging to the estate, for which a judgment was obtained against the borrower, and made a final settlement of her administration. Subsequently, she assigned the judgment to A, as security for a note given for money borrowed. The note not being paid, A was proceeding to collect the judgment, when B, sole heir of the estate, filed a bill to enjoin A from proceeding to collect it. The bill, not charging fraud, alleged that the complainant was entitled to a share of the judgment, as heir, and that the administratrix was insolvent. Held, the rights of third persons could not be prejudiced in this state of facts, until B, the heir, had ascertained and established his right.⁴ So where an administrator brings a suit for land for the benefit of the heirs, more than seven years after the death of the intestate, one of the heirs having been ever since *non compos*, and the other a *feme covert*, and abandoned by her husband, who would not bring a suit; equity will not enjoin the suit.⁵ So where the heirs and next of kin took possession of the estate, divided, and sold some of it; held, equity could not restrain an administrator from recovering the property at law.⁶

¹ Williams v. M'Cormack, 7 Humph. 308.

² Furlow v. Tillman, 21 Geo. 150.

³ Fowler v. Williams, 20 Ark. 641.

⁴ Grayson v. Williams, 27 Miss. 553.

⁵ Fleming v. Collins, 27 Geo. 494.

⁶ Carter v. Greenwood, 5 Jones, Eq. 410.

§ 4. An administrator, who had failed to plead because advised that his plea would not avail, and had afterwards discovered facts, which made his plea good, was held to be entitled to relief against judgment on default, as he was obliged, from the nature of his office, to rely upon information.¹ So, after publication of his will, the testator gave certain property, thereby bequeathed, to those of his children to whom he had not previously made advancement. The executor by mistake included the property in the inventory; and those who had been advanced procured a decree for distribution, having joined the other children in their petition without their consent. Held, the joining them was a fraud on the court, and the executor was entitled to an injunction to stay proceedings under the decree.² So an injunction will be granted, on the application of an administrator, upon the suits of creditors of his deceased, where the affairs in administration are involved, complicated, and difficult.³ So after a general decree against an executor to account and distribute, a creditor may be enjoined even from proceeding to a trial at law; though with the right of proving costs. The Lord Chancellor remarked: "The decree gives every creditor who carries in a claim equal to that of a creditor by judgment. The court does not take away from a creditor the benefit of such a judgment, if prior to the decree; but it only supports the decree as equal in point of rank to a judgment, and then follows the rule of law in giving preference to the prior debt in point of time."⁴ So where equity has taken jurisdiction over the estate of a deceased person, for the purposes of settlement, it will restrain by injunction an action against the administrator on his bond for an alleged breach of duty. If the suit was commenced before the decree for an account was entered, the order will be to stay its further prosecution, but if commenced afterwards, the suit may be dismissed.⁵ So averments of an irregular sale of land by administrators, and of acquiescence by the party in interest, will sustain a bill for an injunction against interference by one claiming under the

¹ *Hewlett v. Hewlett*, 4 Edw. Ch. 7.

² *Fairly v. Thompson*, 34 Miss. 101.

³ *Berrs v. Strohecker*, 21 Geo. 442.

⁴ *Goate v. Fryer*, 2 Cox, 201.

⁵ *Washington v. Emery*, 4 Jones, Eq.

32.

acquiescing party.¹ So an action was brought by a creditor of a testator against the executors. Plea, the decree in a suit for administration. The plea was adjudged bad, and judgment given for the plaintiff. On a motion for an injunction by the executors, held, the creditor should be enjoined from enforcing his judgment against the assets, but not against the executors personally.² So an administrator, who, in good faith and for the benefit of the trust, buys and pays for land of the deceased, sold by order of the Orphans' Court, makes improvements, and is then sued by the heirs in ejectment; may sometimes enjoin such suit, for the purpose of having the equities determined in chancery.³ So an administrator may maintain a bill in equity, to compel delivery to him of notes against several distinct parties, which were formerly held by his intestate, and an indorsement and delivery of which were obtained from him by one of the defendants by fraud; and to restrain such defendant and his attorneys from prosecuting suits at law thereon, or parting with the possession of them; and the makers of the notes may be joined as parties.⁴ (a)

§ 5. Where executors, claiming property, resorted to the Court of Chancery to restrain certain creditors from taking it, on the ground that it was needed for the payment of debts; and it was not shown that it was in fact so needed, but the reverse appeared: held, they were not entitled to the relief sought; and, if the fact were otherwise, still, in the absence

¹ *Beckham v. Newton*, 21 Geo. 187.

³ *Mulford v. Minch*, 3 Stockt. 16.

² *Burles v. Popplewell*, 10 Sim. 383.

⁴ *Sears v. Carrier*, 4 Allen, 339.

(a) In South Carolina, where the creditors of an insolvent estate are numerous, the executor may file a bill to enjoin them from proceeding at law, and to have the estate administered in equity. And it seems that he may, in the same bill, make the heirs and devisees defendants, in order to compel a sale of real estate in aid of assets. In such case, the practice is, to make only one or two of the principal creditors defendants, and bring in the others by order. None of them need answer, except when specially required to do so by the court, but may appear and litigate orally. But all are enjoined, by order or injunction issued in conformity to an order, from suing elsewhere. In such case, the funds in the hands of the executor should be placed in the possession of the court to be administered; and it seems that a sale of real or personal estate should be by a master. *Thompson v. Palmer*, 2 Rich. Eq. 32.

of insolvency, the remedy would be at law.¹ So a suit by a creditor against executors will not be restrained, because an order for preliminary accounts and inquiries has been obtained in such suit.² So equity cannot enjoin the sale of property belonging to an estate under a levy, where an indemnity by bond has been given to the sheriff, on a bill by the administrator, alleging that the assets were insufficient to pay debts in full; for in such case the plaintiff claims merely as an incumbrancer, whose remedy is at law, upon the bond, or by a suit to recover the property.³ So the defendant, a creditor, recovered judgment and sued out execution in the lifetime of the debtor, and delivered the execution to an officer the day after the debtor died. A decree was afterwards made, in favor of an equitable mortgage, against the plaintiff, the debtor's devisee and executor, for sale of the mortgaged property, and, if insufficient to satisfy the debt, for an account and application of the general estate, in due course of administration. The defendant having levied on the debtor's goods, the plaintiff moved for an injunction; but it was refused, upon the grounds that the decree for an account, &c., was conditional, and that the execution bound the goods from its *teste*.⁴ So an administrator *de bonis non* recovered a decree, on final settlement, against the administrator in chief; the money was collected of the surety of the latter; the decree was afterwards reversed; and the surety sued at law to recover the money which he had paid. The defendant, alleging that he had paid over the money to the distributees, some of whom were insolvent, and that the surety had been indemnified by his principal, prayed for an injunction against the plaintiff and the suit at law, and for general relief. Held, the defendant was not entitled to an injunction.⁵ So, as long as an executor takes no proceedings in the Orphans' Court, to declare the insolvency of the estate, the Supreme Court, having no judicial notice of such insolvency, cannot restrain the payment of executions against the estate, according to their legal priority.⁶

¹ Johnson v. The Connecticut Bank, 21 Conn. 148.

² Teague v. Richards, 11 Sim. 46.

³ Jarrell v. Eddins, 2 P. & H. (Va.) 569.

⁴ Ranken v. Harwood, 5 Hare (26 Eng. Cha.), 215.

⁵ Simmons v. Williams, 27 Ala.

507.

⁶ Dibble v. Woodhull, 4 Zab. 618.

So where a claim was allowed by an administrator, and approved by the probate judge, and it was subsequently discovered that the claim was *statute-run* at the time it was allowed, though the claimant had in his possession a written promise of the intestate, amounting to a renewal of the debt, which promise he did not present; held, an injunction could not be granted to stay action on the claim, as the mistake was made by all parties, and, before a wholly new action could be begun, the new promise itself would become *statute-run*.¹ And an injunction in favor of an administrator, on the ground of a deficiency of assets, should not be made perpetual, but only until assets shall come into his hands, reserving to the creditors to show assets by *sci. fa.* at law.² So the plaintiff, an administrator, representing that he had fully administered, paid all debts, &c., obtained a final accounting, but it remained uncertain whether the estate owed him a small sum. There was no order, extending the time of settlement, discharging him, or assigning the estate to the heirs. He brings an action, to restrain the defendant, occupying land belonging to the estate under a lease from the guardian of the infant heirs, from selling a crop raised by him. Held, an injunction should not be granted, as he could not be charged, in final settlement, with any part of the crop, and, if anything was due him, the estate without the crop was ample security.³

§ 6. Where administrators filed a bill, praying for an injunction, upon the ground that more money was due on a previous judgment revived in their favor against the defendants, than was due on the judgment for which the plaintiffs were then pressed for payment; held, equity would not interpose by injunction, to prevent circuity of action, the remedy being peculiarly a common law remedy.⁴

§ 7. An administrator, who wishes an injunction against a judgment at law against his intestate, must give the bond required by statute in case of applications for injunction.⁵

¹ Jones v. Underwood, 11 Tex. 116.

⁴ Clay v. Sheftall, T. U. P. Charlton,

² Haydon v. Goode, 4 Hen. & M. 263.
460.

⁵ Osborn v. Ellis, 1 Cart. 451.

³ Converse v. Ketchum, 18 Wis. 202.

§ 8. Under the Tennessee statutes of 1829 and 1831, a judgment against an administrator or executor within six months after qualification, and an execution issued within less than twelve months, cannot be enjoined in chancery.¹

§ 9. A few miscellaneous cases may properly here be stated, where the remedy of injunction has been invoked in reference to the estates of persons deceased.

§ 10. Where a judge of an orphans' court is advised that an injunction has been granted at the instance of an executor, to restrain the heirs and distributees from proceeding with a settlement begun in such court; he should suspend all further proceeding, as long as the injunction continues in force.²

§ 11. Where suits are enjoined before judgment, and a bond for the debt given by the administrator, he becomes personally liable, if the injunction is dissolved and the suits are prosecuted to judgment.³

§ 12. The power of the Court of Chancery of Maryland, to grant injunctions to restrain creditors from proceeding at law, after a decree for an account, is not confined to cases in which the application is made by the executor or administrator, but extends to applications made by the heir, or by another creditor, or a common legatee, or by a residuary legatee.⁴

§ 13. A, an infant, died intestate, possessed of property, and leaving B, an infant brother, her sole distributee. There being no debts, no administration was taken out, but the property passed into the hands of the father of B, and was levied on under an execution against him. Held, equity would restrain a sale.⁵

§ 14. Where two administrators make a sale, but only one

¹ *Roche v. Washington*, 7 Humph. 142.

² *The State v. The Judge*, 15 Ala. 740.

³ *Brown v. Speight*, 30 Miss. 45.

⁴ *Boyd v. Harris*, 1 Maryland, Ch. Decis. 466. See *Jackson v. Leaf*, 1 Jac. & W. 229.

⁵ *Gould v. Hill*, 18 Ala. 457.

executes the deed ; equity will enjoin an ejectment brought by the heirs on this ground.¹

§ 15. One distributee, who makes a fraudulent representation as to property of the estate offered for sale, without the knowledge of the others, does not thereby affect their rights. The purchaser has his remedy against him ; and he cannot enjoin the purchase-money.²

§ 16. Where an executor had assented to a legacy to A, and delivered the property to her, and afterwards obtained an order of court to sell the property for payment of debts ; held, A's right to the property was complete at law, that she had a full legal remedy for any injury, and therefore had no right to apply to equity for an injunction.³

§ 17. Where a distributee contested the will, and obtained an injunction upon a debt due by her to the estate ; and, after verdict against the will, the injunction was dissolved : held, the injunction should have been retained, until it was ascertained whether the debt would be needed to pay debts, and, if not, the debt should be applied to her distributive share.⁴

§ 18. Heirs residing out of the State having instituted a suit for the sale of land descended to them, and the same having been sold, and the proceeds being in the hands of a commissioner directed by the court to collect them ; a creditor of the ancestor, seeking to subject these proceeds to the payment of his debt, should apply by petition to the court to be made a party in the cause, and to have the fund thus applied by proceedings in that cause. Or, if he proceeds by foreign attachment, the commissioner should be a party, and be restrained by indorsement on the process from disposing of the proceeds. Or, if the creditor proceeds against the heirs to marshal the assets, there should be an injunction to restrain the commissioner from paying away the money in his hands.⁵

¹ Wortman v. Skinner, 1 Beasl. 358.

² Williams v. McCormack, 7 Humph. 308.

³ Howell v. Howell, 5 Ired. Eq. 258.

⁴ James v. Langdon, 7 B. Mon. 193.

⁵ Carrington v. Didier, 8 Gratt. 260.

CHAPTER XVII.

BANKRUPTS AND INSOLVENTS.

§ 1. INJUNCTION is a remedy often resorted to with reference to proceedings in bankruptcy and insolvency.

§ 2. In a previous chapter (Chap. VI.) we have referred to an important controversy which arose between the United States Court and the Supreme Court of New Hampshire, with reference to the effect of an *attachment* of property, prior to the institution of bankruptcy proceedings, and the claim of the State court to enforce and perfect such attachment, notwithstanding the subsequent assignment. In the present connection it may be added, that, under the bankrupt law of 1841, the District Court, pending bankruptcy proceedings therein, was held to have the power of enjoining the enforcement of debts due from the bankrupt in a State court; and it was also held that an officer would be liable for selling property after such injunction.¹ And, in general, the comprehensive jurisdiction given to the courts of the United States, under the bankrupt law, was held to involve to a certain extent a control over those of the States. Judge Story, who may be regarded as emphatically the champion of the most enlarged jurisdiction of the former tribunals, remarked: "Under the provisions of the sixth section of the act, the District Court does possess full jurisdiction to suspend or control such proceedings in the State courts, not by acting on the courts, over which it possesses no authority, but by acting on the parties through the instrumentality of an injunction or other remedial proceedings in equity upon due application made by the assignee, and a proper case being laid before the court requiring such interference. Such a course is very familiar in courts of

¹ *Stinson v. M'Murray*, 6 Humph. 339.

chancery, in cases where a creditor's bill is filed for the administration of the estate of a deceased person, and it becomes necessary or proper to take the whole assets into the hands of the courts, for the purpose of collecting and marshalling the assets, ascertaining and adjusting conflicting priorities and claims, and accomplishing a due and equitable distribution among all the parties in interest in the estate. Similar proceedings have been instituted in England in cases of bankruptcy, and they were, without doubt, in the contemplation of Congress, as indispensable to the practical working of the bankrupt system."¹

§ 3. In Massachusetts, the remedy of a party whose rights are affected by an assignment under the insolvent laws, when the preliminary proceedings are irregular, is by application in equity to arrest the proceedings, and set aside the assignment. This may be done, on petition, by any party aggrieved, and the assignment will thereupon be adjudged, once for all, to be valid or invalid.² And insolvency proceedings, commenced before a judge having no jurisdiction, will be set aside on a bill filed under St. 1838, c. 163, § 18, more than a year after. "Lapse of time could only be evidence of acquiescence and consequent assent; and in a case like the present affecting a great variety of persons and interests, consent cannot give jurisdiction."³ So, in Maryland, a bill was filed in chancery on the 14th September, 1846, by the creditors of A, alleging his insolvent condition, and that he designed to give an undue preference to certain of his creditors, especially B and wife. Upon this bill an injunction was granted, restraining A from giving, and B and wife from taking, any such preference. On the 29th of the same month, B and wife filed a bill on the equity side of the Baltimore County Court, alleging A's indebtedness to them on account of his misapplication of certain trust funds belonging to the wife, and his promise to secure them by a conveyance of certain real estate,

¹ Christy, 3 How. 318. See *Regina v. Law*, 40 Eng. Law & Eq. 64; *Moore v. Jones*, 23 Verm. 739.

Wheelock v. Hastings, 4 Met. 504. See *Cheshire, &c. v. Gay*, 3 Gray, 531.

² *Hawson v. Paige*, 3 Gray, 239; *Partridge v. Hannum*, 2 Met. 569;

³ *Grafton, &c. v. Bickford*; per *Shaw, C. J.*, 15 Gray, 564, 574.

which he had failed to do, and praying that he might be decreed to pay them the sum thus due under the trust. A answered this bill, admitting its averments, and, on the 31st of October following, a decree was passed by the Baltimore County Court, directing A to bring into court the amount ascertained and admitted to be due to the complainants. Held, that the original bill of September 14th drew to the Court of Chancery the whole litigation in regard to the distribution of A's estate; that the proceedings of B and wife, in the Baltimore County Court, were in violation of the chancellor's injunction; and that it was competent for the Court of Chancery to restrain, by injunction, the execution of this decree, and treat the whole proceeding in the county court as a nullity. Also, that the appropriate remedy for B and wife was in chancery, on the original bill, that court having ample power to afford them the relief which they sought in another form, in another court of concurrent jurisdiction.¹

§ 4. The plaintiff, an insolvent, agreed upon a certain composition with his creditors. The defendant, a creditor, refused to come in unless the plaintiff would give his note for the balance, which he did; and the defendant brought an action upon the note, having received the agreed percentage. Held, such suit should be enjoined.²

§ 5. A perpetual injunction will be granted, against a suit upon a claim, proved against the estate of a bankrupt in the United States District Court, but afterwards contested by the debtor or assignee, and expunged.³

§ 6. A creditor's bill, to enjoin a debtor from proceeding to obtain his discharge under the insolvent law of New York, must show special cause for the injunction.⁴

§ 7. The defendant, a bankrupt, in August, 1860, obtained the usual order for the protection of his person and property from all process until further order, which protection was ex-

¹ *Albert v. Winn*, 7 Gill, 446.

² *Constantein v. Blache*, 1 Cox, 287.

³ *Pease v. Bennett*, 17 N. H. 124.

⁴ *Shanck v. Sniffen*, 1 Barb. 32.

tended until the 5th of June, 1861, and his proposal (to pay 10s. in the pound by certain instalments) was assented to by the requisite number of creditors, and approved by the commissioner. On the 5th of March and 4th of April, 1861, the plaintiffs having obtained two judgments against the defendant; and on the 21st of April, 1861 (and whilst his protection was in force), commenced an action against him upon those judgments: the court refused to stay the proceedings therein.¹

§ 8. The (Wis.) Circuit Court, in which an application is pending, under the statute "for the relief of insolvent debtors," may restrain one creditor from prosecuting supplementary proceedings against the assets of the debtor contained in his schedule, to prevent his gaining an unfair advantage over the other creditors.²

§ 9. In a recent case in the United States District Court (Massachusetts),³ the property of a bankrupt, being sold, upon leave obtained by the messenger, was purchased by A for the bankrupt, who proceeded to sell the property. Held, the assignee was entitled to an injunction to restrain such sale.

¹ *Naylor v. Mortimore*, 10 C. B. (N. S.) 566.

² *Sexton v. Mann*, 15 Wis. 162.

³ *March v. Heaton*, October, 1868.

CHAPTER XVIII.

PRINCIPAL AND AGENT.

§ 1. In general, an injunction will not be allowed, nor a decree rendered, against an agent, where the principal is not made a party. Thus, to a bill for enjoining collection of the purchase-money for land, though sold by an agent, who took a bond to himself, the principal is an indispensable party.¹ So one for whose use an action at law is brought, which fact is apparent from the record, should be made a party to a bill enjoining the judgment.²

§ 2. Where the principal is not subject to the jurisdiction of the court (as in the case of a sovereign State), the rule may be dispensed with.³ But an injunction does not lie against the agent of a foreign government, charged only with the settlement of certain claims upon such government, and acting wholly under the control of its resident ambassador. The defendant was said "to be in much the same situation as an inferior servant, who is bound to take the directions of an upper servant, while both are bound to take directions from the same mistress;" and held to have all the immunities from this process, provided either by the common or statute law, which the ambassador himself would have.⁴ (So it is erroneous to make a mere agent party to a suit for specific performance of a contract; and, if he is made a party, the complainant will not be entitled even to a decree for costs against him, although he suffers the bill to be taken as confessed for want of an answer.⁵) (a)

¹ *Sweets v. Biggs*, 5 Litt. 17; 9 Wheat. 738.

² *Turner v. Cox*, 5 Litt. 175.

³ *Osborn v. Bank, &c.*, 9 Wheat. 738:

⁴ *Service v. Castaneda*, 2 Coll. 56.

⁵ *Boyd v. Vanderkemp*, 1 Barb. Ch. 278.

(a) It is doubted whether service of notice of an injunction on an agent, when

§ 3. The defendant, holding certain chattels as agent of the plaintiff, in breach of his duty, contracted to sell them. Upon the ground that by such sale the plaintiff's title would be embarrassed, he was allowed to maintain a bill for an injunction.¹ So a bank recovered a judgment against A for \$59,000. B, assuming to act as agent and attorney of the bank, effected a compromise with A to pay \$20,000, and A assigned and delivered over to B, as agent and attorney, property and securities to that amount. The bank denied the authority of B to make the compromise. A assigned the property and securities to C, and B refused to redeliver them and was proceeding to collect and dispose of them. Upon bill filed by C, an injunction was granted, to restrain the collection and disposition of the property and securities, and the chancellor refused to dissolve the injunction, on motion to dissolve for want of equity in the bill.²

§ 4. Where the payee of a note deposits it in the hands of an agent, to be collected, who causes a suit to be instituted thereon in the payee's name, for his own use, and, upon a judgment being obtained, refuses to yield the control thereof, but insists upon collecting and appropriating the proceeds to himself; equity may enjoin the agent from all further interference, and the defendants in the judgment from paying, until the matters shall be there heard and adjudicated.³

§ 4 a. The defendants were a tea company, in the formation of which, it was made a leading condition of the prospectus, that the plaintiff's firm should be managers and agents. The plaintiff files a bill in equity, praying for an injunction to restrain the defendants from accepting the firm's resignation of their agency, upon the ground that it was conditional on his being relieved from all liability for shares, which condition had been violated. Held, the agency was a personal service,

¹ Wood v. Rowcliffe, 3 Hare, 308.

² Dunn v. Dunn, 8 Ala. 784.

³ Pratt v. Campbell, Haring. Ch. 236.

the principal is out of the jurisdiction, is good, especially when the former is merely an agent for the sale of the goods of the latter. Carron, &c. v. McLaren, 35 Eng. Law & Eq. 37.

and not a proper subject for equitable interference ; but the directors were at the same time put upon an undertaking not to avail themselves of the resignation in any suit for the amount due on shares.¹

§ 4 b. A, who had been the agent of B, his father-in-law, closed their dealings hurriedly, and obtained from B his note in settlement of the account, which had been made on A's calculations, and at his urgent request, upon the agreement that the whole settlement should be open to subsequent examination. A sued the note, and B filed a bill to have the judgment thereon enjoined. A answered the specific allegations of the bill evasively. Held, an injunction should issue, to continue until the hearing, and the judgment stand as security for whatever might be ascertained to be due.²

§ 5. Under a contract of hiring and service, containing stipulations of such a nature that specific performance could not be enforced, equity will not restrain the employer from excluding, or enjoin him to retain, a servant, agent, or manager ; it seems, even if there has been no breach of covenant by the latter.³

¹ *Mair v. Himalaya*, Law Rep. (Eng.) Eq., March, 1866, p. 410.

² *Hadley v. Rountree*, 6 Jones, Eq. 107.

³ *Stocker v. Brockelbank*, 5 Eng. Law & Eq. 67.

CHAPTER XIX.

HUSBAND AND WIFE; INFANT; GUARDIAN; REMAINDER.

§ 1. " At the common law the *husband and wife* are treated, for most purposes, as one person. — A man cannot grant anything to his wife, or enter into a covenant with her. — It is also generally true that contracts, made between husband and wife, when single, are avoided by the intermarriage. Upon the same ground it is, that if the wife be injured in her person or property during the marriage, she can bring no action for redress without the concurrence of her husband ; neither can she be sued, without making her husband also a party. All this is very different in the civil law. Courts of equity, for many purposes, treat the husband and wife as the civil law treats them, as distinct persons, capable (in a similar sense) of contracting with each other, of suing each other, and of having separate estates, debts, and interests." ¹

§ 2. Where the separate estate of a wife is levied on for the debt of her husband, an injunction may be obtained to stay the sale, in default of any other remedy.² Thus in the case of *Lady Arundell v. Phipps*, Lord Eldon interfered by injunction in favor of a married woman to protect ancient family pictures, furniture, and other articles of peculiar nature and value, taken on execution by creditors of the husband.³ So with the assent of the husband the labor of his wife and minor children may be applied to her separate estate ; and his assent will be implied by circumstances. And an injunction was granted, to restrain a creditor of the husband from selling on execution growing crops, which were produced on the separate property of the wife by her labor and that of her

¹ 2 Story, Eq. 734, §§ 1367-8. See *Cayce v. Powell*, 20 Tex. 757.

² *Calhoun v. Cozens*, 3 Ala. 498.
³ 10 Ves. 139.

children.¹ So a bequest to an unmarried woman was made for her separate use. She afterwards married, and the property was seized upon an execution against the husband. Held, although the husband was at law entitled to the property, it was only as trustee, and an injunction was granted to restrain a sale.² So, although courts of equity usually refuse to restrain a trespass by injunction, yet, where property was bequeathed to the separate use of a feme covert without any trustee, and was about to be sold under an execution against the husband for his debt; held, the legal estate being in the husband, and therefore there being no one to sue for the trespass, the court would interfere by injunction.³ So A made a deed of property to B, in trust for his daughter, which was not recorded. The property went into possession of the daughter's husband, and was levied on and sold under an execution against him, and bought by C. B obtained a verdict against C, which C never paid. The daughter filed her bill for an injunction against B and C, for the specific delivery of the property, and for an account of its hire. Held, as C had acquired no title under the execution sale, and the verdict had never been paid, he had neither the legal nor equitable title, and the complainant was entitled to the relief prayed for; and B was enjoined against enforcing the verdict against C.⁴ So A married B, the sister of his deceased wife, in 1821. Previous to the marriage, she being a minor, they executed a marriage settlement, by which her property was conveyed to a trustee, in trust for her separate use during her life. In 1824, they were indicted for their marriage and cohabiting as man and wife, and appeared by attorney and pleaded guilty, and the court thereupon adjudged the marriage null and void. They, however, continued to live and cohabit together as man and wife; and two, at least, of their four children were born after the judgment. B, however, dealt and was dealt with, as to her property, as a *feme sole*. She died in 1833, having given all her property by will to be equally divided among her four children, and having appointed

¹ Johnson v. Vail, 1 M'Cart. 423.

² Smith v. Bank, &c., 4 Jones, Eq

³ Newlands v. Painter, 4 My. & Cr. 303.
408.

⁴ Bush v. Bush, 3 Strobb. Eq. 131.

A their guardian. A qualified as guardian, and, as such, took possession of the property. A creditor of A, having recovered a judgment against him, levied his execution upon certain of the property, so left by B's will. The four children, by their next friend, brought a bill in equity against the creditor for an injunction, which was granted, and, upon a hearing, perpetuated.¹ So a wife may enjoin execution of the deed upon the sale of a homestead under an execution against her husband.²

§ 3. Equity will enjoin interference by a husband with property settled on the wife.³ So it is held that, where the claimants of a husband's interest in his wife's property cannot effect a division without the aid of a court of equity, a sale of the property will be enjoined till she is suitably provided for.⁴ So equity will, on application by the wife, restrain her husband from proceeding at law to obtain possession of a legacy or portion in personal estate, which comes to her by will or inheritance, without providing for her support, unless she is residing apart from him, without his consent, and without sufficient cause.⁵

§ 4. A borrowed money from B, arising from the sale of his wife's real estate, and gave a bond therefor payable to the wife. On the husband's death, the wife brought suit on the bond against A, who filed an account of set-offs, consisting of the dealings of B with A's firm, and alleged an agreement that such dealings should be set off against the bond. This plea was waived, and judgment had for the plaintiff. The defendant then filed a bill praying an injunction against the judgment. Held, if the defendant had any defence, it was a legal one, which having failed to make, with no excuse, he could have no relief in equity. And this although A was also B's executor, and in that capacity was not a party to the previous suit.⁶

¹ Kelly v. Scott, 5 Gratt. 479.

² Dunn v. Tozer, 10 Cal. 167; Alverson v. Jones, 10 Cal. 9.

³ Green v. Green, 5 Hare (26 Eng. Cha.) 400 n.

⁴ Corley v. Corley, 22 Geo. 178.

⁵ Fry v. Fry, 7 Paige, 461.

⁶ Perkins v. Clements, 1 P. & H.

§ 5. Where trustees under a deed from the wife, who was deceased, undertook to sell, to satisfy debts, according to the terms of the deed; an injunction to restrain the sale was refused to the husband, who had paid or tendered only part of the debts.¹ And to maintain an injunction against the sale of lands of a deceased wife under a trust deed from her, as her administrator, the husband must show that he inherited some interest in the land.²

§ 6. French stock, belonging to a bankrupt, was transferred by him to his wife, who afterwards transferred it to her sisters; and the wife, having a general power of appointment over moneys standing in the name of trustees in the English funds, made a will, by which she exercised the power, and died, leaving the husband. One of the sisters, being an appointee and residuary legatee, and usually residing in France, took out administration upon her estate, with the will annexed. Held, the assignee of the husband might enjoin the trustees from transferring any of the stocks in the English funds, over which the power of appointment of the wife extended.³ So where the husband of an executrix was abroad, and an irresponsible person; held, a party interested in the estate might by injunction restrain her from getting possession of the assets, and have a receiver appointed, with authority to bring actions in her name.⁴

§ 7. In a suit for separation of husband and wife, an injunction master has no power to grant an injunction, which will deprive the husband of the custody of his children; and such an injunction will not be granted, *ex parte*, by the court itself, except in a case of necessity, as to prevent the children from being carried out of the jurisdiction.⁵

§ 7 a. Where a wife, on filing a bill for divorce, alleges that "she has just cause to fear, and does fear, that, on the filing and service of the bill, her husband will remove or dispose of

¹ Stringham v. Brown, 7 Clarke, 33.

² *Ib.*

³ Stead v. Clay, 4 Russ. 550.

⁴ Taylor v. Allen, 2 Atk. 213.

⁵ Laurie v. Laurie, 9 Paige, 234.

his whole property," but states no facts which cause her fears, she is not entitled to an injunction.¹

§ 8. Where a suit at law is brought against the husband and wife, for the purpose of affecting her interest, she is a necessary party to a bill in chancery, by the husband, for an injunction to restrain proceedings in the suit.² But in a bill in equity to set aside a will, securing to the testator's daughter, who is a married woman, and to her issue, a share of the testator's property, for her separate use during coverture; the husband and wife should not join as complainants, their interests being in conflict; but the wife should be made a defendant.³

§ 8 a. A conveyance by a woman, after a marriage engagement, and upon the eve of marriage, is a fraud upon the rights of the intended husband, and it will not be upheld, unless it appears clearly that he had knowledge of the transaction and assented to it. When a voluntary conveyance was made, under such circumstances, of all the woman's property to a man of small means, he was enjoined from removing the property from the State, although it did not appear that he had any intention to do so.⁴

§ 9. Judge Story remarks, that "the origin of chancery jurisdiction over *infants* is very obscure, and has been a matter of much juridical discussion. The prevailing theory is, that the king is bound to protect all his subjects, and is represented in this particular by the Court of Chancery. Another explanation is that guardianship is in the nature of a *trust*, which is a peculiar subject of equity jurisdiction. — But, whatever may be the true origin of the jurisdiction — it is now conceded, on all sides, to be firmly established, and beyond the reach of controversy. Indeed, it is a settled maxim, that the king is the universal guardian to infants, and ought, in the Court of Chancery, to take care of their fortunes."⁵

¹ Norris v. Norris, 27 Ala. 519.

² Booth v. Albertson, 2 Barb. Ch. 313.

³ Alston v. Jones, 3 Barb. Ch. 397.

⁴ Johnson v. Peterson, 6 Jones, Eq. 12.

⁵ 2 Story's Eq. pp. 692-705, §§ 1328-1337. See Wellesley v. Beaufort, 2 Russ, Ch. 1, an interesting and important case.

The prevailing and almost universal practice in the United States has vested the special jurisdiction of the subject in the *courts of probate*, and thus rendered the English doctrines and decisions comparatively unimportant. (a)

§ 10. A *guardian*, by request of the ward, changed the ward's personal into real estate, and some of her real into personal estate, for the purpose of reinvesting in other real estate. The ward having married, her husband assented to these proceedings, but brought a suit upon a note taken for the real estate sold. The guardian brings a bill to enjoin a suit against himself, brought by the husband as administrator of his wife for the moneys thus invested. The husband, by cross-bill, offers to make a valid title to the purchaser of the land. Held, the suit against the guardian should be enjoined.¹

¹ Singleton v. Love, 1 Head, 357.

(a) Equity may restrain a father from moving his infant child out of the country. *De Manneville v. De Manneville*, 10 Ves. 64. In cases of gross drunkenness and blasphemy, the father's right to the control of his children is subordinate to the power of the court to take his child from him. 10 Ves. 62. Where an infant ward is about to marry without the consent of the court, an injunction lies, to restrain the marriage, and all verbal or written communication with the infant; and, if the guardian connives at the marriage, he may be enjoined against consenting without leave of court. *Eden*, 349; *Pearce v. Crutchfield*, 14 Ves. 206; *Water v. Yorke*, 19 Ib. 451. A minor entered into partnership in Sussex County, New Jersey, with two others, and put in \$1,000. Before he came of age the partnership was dissolved, the minor receiving his \$1,000. After the dissolution, he removed to Huntington County, and A recovered a judgment against the members of the firm, including the minor, without his knowledge. A transferred the judgment to B. Three years afterwards, B brought an action on the judgment and recovered a second judgment, no process being served on the minor. B caused an execution to be issued to the sheriff of Huntington County, and to be levied on the property of the minor there. The minor filed a bill, stating the foregoing facts, charging fraud, &c., and obtained an injunction to stay proceedings on the execution. On motion, made to dissolve the injunction, it was ordered that it be continued to the hearing. *Vansyckle v. Rorback*, 2 Halst. Ch. 234.

Where the friends of an infant made an exchange of his property for other property, and that received in his behalf was carried off by his friends and sold, and he afterwards, without taking any benefit from the arrangement, repudiated it, and recovered in trover for the property belonging to him; equity will not interfere to restrain his execution, with the view of compelling him to return the property received on his behalf or account for its value. *Yarborough v. Yarborough*, 6 Jones, Eq. 209.

§ 10 a. In 1821, A was appointed guardian, and gave bond with B and C as sureties. In 1825, A died, insolvent and in debt as guardian, B was appointed his successor, and C became his surety. B, before receiving any funds, charged himself with the balance due from A, collected a portion of it from A's estate, and made some other collections, and paid over various sums to his ward, a part from his collections, and a part from his own funds. In 1845, the ward sued B's bond, and recovered judgment, against B and C. B paid a portion of the judgment, and C, to save his property from a levy, paid the balance, took an assignment of the judgment, and was proceeding to sue out execution against B. B having filed a bill in equity for an injunction, it was held, that B was not concluded as to his rights, as against C, by having charged himself with the balance due from A ; that, the claims between B and C as co-sureties in the first bond having become complicated by sundry payments and receipts, the case was a proper one for a court of equity ; that it was contrary to equity for C to endeavor to recover the whole amount of the judgment from B ; and that an injunction should be granted.¹

§ 11. Where there is a *tenant for life* of personal property, and a *remainder-man*, and the tenant for life sells the property to a third person, who threatens to convey it out of the State, the remainder-man is entitled to an injunction.² But, to induce a court of equity to interfere with a tenant for life, in the enjoyment of his property, by an injunction or sequestration, it is necessary for the remainder-man to allege and prove facts and circumstances, showing reasonable ground to apprehend that such tenant will commit a fraud and defeat the ulterior estate, by destroying the property, or removing it to parts unknown.³ Thus equity will not restrain the owner of a determinable estate in the enjoyment of his rights, on proof of an isolated conversation between him and the ulterior claimant, in which the former, under the excitement of spirits and of an angry quarrel, made a threat to run the property off and defeat the expectancy.⁴

¹ Flickinger v. Hull, 5 Gill, 60.

See Cross v. De Valle, 1 Wall. (U. S.)

² Brown v. Wilson, 6 Ired. Eq. 558.

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³ Mercer v. Byrd, 4 Jones, Eq. 358.

⁴ Airs v. Billops, 4 Jones, Eq. 17.

CHAPTER XX.

SURETIES.

§ 1. "WHENEVER a creditor, in pursuance of a valid agreement for such a purpose, gives time for payment to the principal debtor on a bond or other security, without the consent of the surety, the latter will be held discharged in equity, although he might still be held bound at law — whether the surety has sustained any actual damage or not," or though "the arrangement may be for his benefit. — Under such circumstances, the surety has a right to restrain the creditor from proceeding at law against him to recover the debt; and a perpetual injunction constitutes the true and effectual remedy."¹(a) Thus where a creditor recovered judgment

¹ 2 Story, Eq. 199, § 183. See *Tysor v. Sutterloh*, 4 Jones, Eq. 247; *Armistead v. Ward*, 2 P. & H. 504.

(a) In an English case, the same principle is thus expressed: "Because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not; and because he, in fact, cannot have the *same* remedy against the principal as he would have had under the original contract." Per Lord Eldon, *Samnell v. Howarth*, 3 Meri. 277.

In the case of *Nisbet v. Smith*, 2 Bro. 579, the Lord Chancellor thus stated the case: "The plaintiff Nisbet complains of this transaction as unjust, as it gave a credit of three years longer than the bond imported, contrary to his inclination, who was the surety named in it; in addition to which circumstance the plaintiff had not only never consented to such credit being given, but had pressed the obligee to bring his action upon the bond, which was so brought and compromised, without the privity and consent of the plaintiff. — Though the prayer of the bill is not so framed as to let in any particular relief, I think the best relief I can give is, to decree a perpetual injunction against (the defendant) to restrain him from suing the plaintiff on this bond."

In the case of *King v. Baldwin*, 2 John. Ch. 555, Chancellor Kent gives an extended view of the cases upon this subject; resulting in the conclusions, that a surety is not discharged by mere delay in calling on the principal, but is discharged by an express agreement, made without the surety's assent, which enlarges the time of payment; that the surety, on paying the debt, is entitled to be subrogated to all the creditor's rights against the principal; that the rules

against the principal and surety, levied his execution on property of the principal, and, on payment of part of the execution, directed the sheriff to restore the property, and gave further time to pay the residue, without the assent of the surety; held, the judgment was thereby discharged as to the surety; and, if these facts had been returned on the execution, he might have been relieved at law; but, they not having been returned, equity would enjoin any subsequent execution.¹ So where a judgment is entered against the principal and surety in a note, by confession upon a power of attorney, which provides that no bill in equity should be filed, to interfere in any manner with the operation of the judgment entered by virtue thereof:—and the surety may file his bill in equity for relief against the judgment, on the ground that he was released, by the payee's extending the time of payment to the principal maker, before the entry of the judgment, without the assent of the surety.² So A and B signed a note with C, as his sureties, to D. D recovered judgment upon the note, and assigned it to E, who, with notice of the facts, agreed by parol with C to extend the time of payment, and did so. E afterwards sued A, B, and C, upon the judgment, and A and B unsuccessfully set up the extension of time in defence. A and B then filed a bill for injunction. Held, the defence was good in equity, though not at law, and a perpetual injunction was ordered.³

§ 2. And there are numerous other cases, where equity interposes by injunction for the relief of a surety. (a) Thus where execution issues on a judgment against principal and

¹ Baird v. Rice, 1 Call, 18.

³ Dunham v. Downer, 31 Verm. 249.

² Kennedy v. Evans, 31 Ill. 250.

for relief of a surety are the same in law and equity, upon the same facts; and that equity will not relieve a surety upon the same grounds which were unsuccessfully set up by him in a suit at law.

In a later case, upon the last point, the Court of Errors were equally divided in opinion, and the president, by his casting vote, affirming the opinion of the chancellor, decided that the same ground might be relied upon in chancery which was overruled at law. King v. Baldwin, 17 John. 384.

(a) As to the same interposition against a surety, see Isler v. Turner, 7 Humph 116.

surety, and a part of the money is made by a levy on the estate of the principal, but the execution is returned "no money made," and an *alias* issued against the surety for the whole amount of the judgment; the sheriff having absconded, the surety is entitled to relief in equity, and the court may enjoin the execution for the amount made.¹ So where the surety on a note had a good defence thereto, of which the principal debtor was the only witness, a bill by the surety, to restrain a suit at law upon the note, against himself and the principal jointly, and for relief against the note, was sustained.² So a judgment against a surety for an annuity was enjoined, he being discharged, by a giving of time to the principal, from past as well as future arrears.³ So W. recovered judgment against S. as principal, and J. as surety, on a simple contract debt. Before execution issued, W. sued out a garnishment upon the judgment against F., and recovered judgment thereon. Before this judgment, full satisfaction of the debt was made by J. Upon proceedings in equity to compel F. to pay the amount due to J., it was decreed: That, when J. paid the original judgment to W., the judgment was extinguished at law, as between W. and S. and J., and that, if the judgment upon the garnishment against F. had been finally rendered at the time of the payment of the original judgment, it would also have been extinguished at law, so far as W. was concerned. That, J. having paid the original judgment before final judgment upon the garnishment, had F. known the fact, and interposed it as a defence, the court of law could have rendered no judgment against him in favor of W. for the debt which he owed to S. That, on payment of the original judgment, W. having failed to enter satisfaction thereof in the manner prescribed by statute, and F. being thereby deprived of the legal mode of deriving a knowledge of such satisfaction, and having no actual notice of the payment in any other manner, and judgment having been rendered against him upon the garnishment after such payment; he might in equity enjoin the execution of the judgment, so far as W. was concerned. That, though the payment of the original judgment by J. ex-

¹ Fryer v. Anstell, 2 Stew. 119.

² Miller v. McCan, 7 Paige, 457.

³ Eyre v. Bartrop, 3 Mad. 221.

tinguished it, and extinguished the right of W. to proceed upon and enforce the garnishment against F. at law, yet such payment did not extinguish the debt which F. owed S.; and, had F. filed his bill to be relieved from the judgment against himself exclusively, upon the ground of the payment of the original judgment by J., having made J. a party, equity would hardly have granted him such relief, without his paying to J. the debt which he owed to S., in the absence of any showing on his part of an equitable right to withhold such payment. That, as the judgment against F., in favor of W., was at law extinguished by the payment of the original judgment against S. and J., and as the execution of the judgment against F. by W., in whose favor it stood upon the record of the law court, was perpetually enjoined; the right of the surety to be subrogated to the rights of W. must be enforced by a decree of a court of equity, upon a proper case made for its interposition by parties claiming such rights. That, as judgment at law was recovered against F., as surety for S., by another creditor, before judgment was recovered against him in the garnishee suit in favor of W.; the claim of F. to indemnity in equity was hardly cut off by the proceedings at law in the garnishment suit, where he was not permitted to interpose an equitable defence.¹

§ 3. The sureties upon a note cannot maintain a suit in equity to be relieved against a judgment at law upon the note, on the ground that the note was given for a usurious loan, and that the payee, who had indorsed the note to the nominal plaintiff in the suit at law, testified on the *voir dire* that he was the owner of the note and the plaintiff in interest, and the court excused him thereupon from testifying; the defendants having given notice of the defence of usury, but not having verified the notice according to law so as to entitle them to examine the plaintiff as a witness. Nor can they sustain the bill upon any ground which might have been set up as a defence in the action at law, unless prevented from setting it up by fraud or accident, or by the act of the opposite party.² So, where judgments were recovered against sureties

¹ *Newton v. Field*, 16 Ark. 216.

² *Vilas v. Jones*, 1 Comst. 274.

by default, and suit was afterwards brought against the administrator of the principal, in which the defence of usury was successfully made, he having accidentally discovered the evidence of it among the papers of the principal, and judgment therein was rendered for the sum loaned only, which he paid; held, this was a satisfaction of the judgments against the sureties only *pro tanto*, and that they could be relieved from the judgments, on the ground of usury, only on paying the sum loaned and legal interest.¹

§ 4. Where a surety receives a mortgage of property from his principal to indemnify him, and afterwards it is levied on for the debt of the principal, while it is uncertain whether the surety will sustain a loss by his suretyship; the surety may have an injunction to restrain the sale.² So an injunction was granted, where the obligee of a bond with surety took a mortgage for a part of the debt from the principal, and agreed to receive the residue by instalments, secured by warrant of attorney to confess judgment, without prejudice to any security held by him.³ But upon a bill, by a surety, to be discharged from his liability, the court, having denied the prayer of the bill, refused to grant an injunction, restraining the creditor from enforcing the debt, to give the surety an opportunity to avail himself of collateral security.⁴ And where A, as surety of B, received property from him as indemnity; and C afterwards recovered a judgment against A, and levied the execution on the property, and A then brought an action of trespass against C, and recovered judgment, which C enjoined by bill against A alone: held, B should have been made a party, and the bill was dismissed without prejudice.⁵

§ 4 a. On the other hand, an action against a surety may be enjoined, where equity requires that the debt should be first satisfied from securities of the principal debtor held by the creditor as a primary fund; more especially in case of doubt as to their validity. Equity holds that this question

¹ Jones v. Kilgore, 2 Rich. Eq. 63.

² Marshall v. Colvert, 5 Leigh, 146.

³ Boulton v. Stubbs, 18 Ves. 19.

⁴ Rutledge v. Greenwood, 2 Desau. 389.

⁵ King v. Harper, 4 Bibb, 570.

should be first settled in an action, and at the expense of the creditor.¹

§ 4 b. The defendant A took from B, as security, bills accepted by B, and drawn and indorsed by C, the plaintiff. The bills being dishonored, A drew accommodation bills on B, which B accepted, but A paid, and brought an action upon the dishonored bills against C, who files a bill for an injunction. Held, the action might proceed, but execution was stayed. The vice-chancellor remarked that the same point might be raised and determined in the action, the rules of equity and law on the subject being perfectly similar.²

§ 4 c. If a surety upon a promissory note seeks relief, either in equity or at law, upon the ground that he is released by an extension of the time of payment to the principal, without his assent; he may establish the fact of his suretyship by evidence *aliunde*, if it does not appear from the face of the note itself.³

§ 4 d. Where the plaintiff guaranteed the payment for any goods to be supplied by the defendant to A between certain dates, and A accepted bills for the amount of goods delivered, which the defendant renewed without notice to the plaintiff, in consequence of A's inability to pay: held, not a guaranty for an indefinite time, but one subject to the usual course of trade; and the plaintiff was discharged from his liability, although the extension could not be injurious to him; and an action against him upon the guaranty was enjoined.⁴

§ 5. Equity will not enjoin a judgment against the surety upon a note, on the ground that the note was procured through misrepresentation as to its purpose by the principal, unless the payee were also guilty of such misrepresentation.⁵

§ 6. If sureties neglect, when judgment is rendered, to cause the entry to be made that they are sureties, as required

¹ Hays v. Ward, 4 John. Ch. 134.

² Mackintosh v. Wyatt, 3 Hare (25 Eng. Cha.), 562, 566.

³ Kennedy v. Evans, 31 Ill. 258;

Flynn v. Mudd, 27 Ill. 323.

⁴ Samnell v. Howarth, 3 Meri. 271.

⁵ Griffith v. Reynolds, 4 Gratt. 46.

by statute (of Ohio), chancery will not compel the judgment creditor to exhaust first the property of the principal.¹

§ 7. M., a stockholder in a manufacturing corporation, with L., another stockholder, indorsed notes of the company, upon the other stockholders' executing a bond to save them harmless; M. and L. to bear any loss only in proportion to the stock held by them. The company afterwards failed, leaving several of the notes outstanding. M. conveyed away his real estate, and removed from the State, and had never paid anything on the notes. L. and the other stockholders, having paid sundry debts of the company on which they were severally holden as sureties, procured suits to be brought on the notes, and the real estate to be attached, in order to compel M. to contribute his *pro rata* share of the loss. M. then brought a bill in equity against L. and the obligors of the bond, praying for an account of the loss, a disclosure, and an injunction against the suits, and alleging that some of the notes had been in fact paid, and were put in suit in bad faith by the respondents. Held, in dismissing the bill, that, so far as the bond was concerned, the plaintiff had no cause of complaint, since it was only a bond of indemnity, and he had not been damnified, having paid nothing on his liabilities for the company; that the remedy at law was sufficient. Also, as the plaintiff was in any event to bear a portion of the loss on the liabilities, the suits were not inequitable.²

§ 8. A bill cannot be maintained, by the sureties of a purchaser under the decree of a court having jurisdiction, and after confirmation of the report of commissioners for the sale, for relief against a judgment on the bond given for the purchase-money, upon the ground of error in the decree or the proceedings under it.³

§ 9. A, being one of several defendants, prosecuted a writ of error, and the Supreme Court affirmed the judgment. They also rendered judgment against the principal and sure-

¹ Elliott v. Elmore, 16 Ohio, 27.

² Monson v. Lawrence, 27 Conn. 579.

³ Worsham v. Hardaway, 5 Gratt. 60.

ties in the writ of error bond. Held, the sureties could not enjoin execution upon the latter judgment, on the ground that the original co-defendants of their principal were not joined in it, nor that a levy had been made on their property, notwithstanding their principal and his co-defendants had sufficient property to satisfy the execution.¹

§ 10. A decree was passed in chancery against an insolvent administratrix and her three sureties, for payment of the sum of \$300 to each of four distributees. One surety, being a non-resident, was out of the case. During the suit, one of the remaining two gave to two of the distributees \$1,000, on account of which they agreed to indemnify him for any judgment which might be recovered against him. The other surety knew nothing of the transaction at the time, but afterwards brought a suit in equity to enjoin the distributees from collecting from him more than one half of the \$1,200. Held, the first surety had in effect paid his share of the whole, and the distributees could be properly enjoined from collecting from the second surety more than his share, or the remaining half.²

§ 11. Judgment being rendered against a principal and surety; the surety executed his note with another surety, on condition that the plaintiff in the judgment would assign the judgment to the surety; but the plaintiff refused to assign the judgment, and entered satisfaction thereof. Held, the surety should have a perpetual injunction against the collection of his note, and the plaintiff should have the satisfaction set aside.³

¹ *Turner v. Smith*, 9 Tex. 626.

³ *Sommerhill v. Cartwright*, 7

² *Johnson v. Givens*, 3 Met. (Ky) 91. *Humph.* 461.

CHAPTER XXI.

PARTNERS AND OTHERS JOINTLY INTERESTED.

1. Partners — general.
2. Application of partnership property to private debts.
9. Dissolution of partnership.
11. Unauthorized competition in business.
17. Breach of covenant.
18. Misconduct of one partner.
19. Collusion; negotiation of bills and notes.
23. Allegations of the bill.
25. Miscellaneous points.
29. Parties jointly interested — tenants in common.

§ 1. PARTNERSHIP is a relation, which in various ways calls for the action of a court of equity; as, for the purposes of discovery, account, specific performance, and dissolution; and in connection with some or all of these main objects, and in some instances without reference to any ulterior end, partnership is made the subject of injunction.

§ 2. Inasmuch as the individual members of an indebted partnership may also owe private debts, the liability of partnership property to satisfy such debts, and the conflicting claims of partnership and private creditors, have given rise to many and nice questions both at law and in equity. The general doctrine upon the subject is thus stated by a writer of high authority: "The joint creditors, in case of insolvency, are deemed in equity to have a right of priority of payment before the private creditors of any separate partner. The joint property is deemed a trust fund, primarily to be applied to the discharge of the partnership debts against all persons not having a higher equity. A long series of authorities (as has been truly said) has established this equity of the joint creditors, to be worked out through the medium of the part-

ners, that is to say, the partners have a right, *inter sese*, to have the partnership property first applied to the partnership debts, and no partner has any right, except to his own share of the residue."¹ The plan of the present work, however, restricts us to a consideration of this point as it has arisen upon applications for injunction.

§ 3. In a leading case upon this subject,² it was held that a separate creditor of one partner cannot hold the partnership effects, taken under an execution for his separate debt, against the partnership creditors. At the time the execution took place the partnership was insolvent; but a commission of bankruptcy had not then issued. Sir A. Macdonald, Ld. Ch. B., said: "The *corpus* of the partnership effects is joint property; and neither party separately has anything in that *corpus*; but the interest of each is only his share of what remains, after the partnership accounts are taken. — In law there are three relations: first, if a person chooses, for valuable consideration, to sell his interest in the partnership trade; for it comes to that; or if his next of kin or executors take it upon his death; or if a creditor takes it in execution, or the assignee under commission of bankruptcy. The mode makes no difference; but in all those cases the application takes place of the rule, that the party coming in the right of the partner comes into nothing more than interest in the partnership, which cannot be tangible, cannot be made available, or be delivered, but under an account between the partnership and the partner; and it is an *item* in the account, that enough must be left for the partnership debts. What is the inconvenience? — The individual trusted to the partnership fund in his idea at the time he was lending the money; not that I believe that is very common. But it may be dangerous in a thousand instances to have anything to do with a trader; as for instance to purchase an estate; for an act of bankruptcy may have been committed. — But look to the danger on the other side; one partner giving a bond; and the creditors of

¹ 2 Story's Eq. 625, § 1253. See *Morrison v. Blodgett*, 8 N. H. 238; *Bell v. Newman*, 5 S. & R. 38; 1 Pars. on Contr. 174; *Somerset, &c. v. Minot*, 10 Cush. 598; *Harmon v. Clark*, 13

Gray, 114; *Hilliard on Bankruptcy, &c.*, chap. 4; *Merrill v. Neill*, 8 How 414; *Glenn v. Gill*, 2 Md. 1; *Douglas v. Winslow*, 28 Maine, 89.

² *Taylor v. Fields*, 4 Ves. 396.

the partnership looking to the stock itself. It is said — this meritorious creditor has a right to be preferred on account of his early diligence. But what is that, to which he is entitled? The estate of a partner is debtor to him. — It, therefore, argues nothing to say, he has the merit of diligence, till we see upon what that merit can attach.”¹

§ 4. In late American cases it is held, that equity will enjoin the levy of an execution, against one partner, on property of the firm, in which it is admitted he has no interest which can pass by a sale; though the bill does not pray for a dissolution.² And where A sold out to B, his partner, retaining, by agreement, a lien upon the property for his own indemnity; and C, a private creditor of B, was about to sell on execution B's interest, before any account taken: held, such sale should be enjoined.³

§ 5. Contrary to the now prevailing rule upon this subject, in the case of *Moody v. Payne*,⁴ an injunction was refused, to stay an execution against the partnership property for the debt of one partner. Chancellor Kent remarked, “I do not know that this court has ever undertaken to stop an execution at law, in such a case, until the partnership accounts have been taken, and it would be too much for me to assume it without precedent. The principle would go to stay executions at law, in every case, against the partnership property of one partner who owed separate debts, until the disclosure and liquidation of the concerns of the copartnership. This would produce inconceivable delay and much embarrassment in respect to separate creditors.”⁵ And in later cases it is held, that chancery will not entertain a bill by a creditor of a firm, to restrain an execution creditor of an individual member from enforcing his remedy against the partnership property;⁶ and that, upon an

¹ And see *Skipp v. Harwood*, or *West v. Skipp*, 1 Ves. 239; 2 Swanst. 586; *Fox v. Hambury*, Cowp. 445; *Young v. Keighly*, 15 Ves. 564.

² *Cropper v. Coburn*, 2 Curt. 465.

³ *White v. Parish*, 20 Tex. 688.

⁴ 2 John. Ch. 548.

⁵ See also *Smith*, 16 John. 106 n.; *Phillips v. Cook*, 24 Wend. 389; *Hergman v. Dettleback*, 11 How. Pr. 46.

⁶ *Young v. Frier*, 1 Stockt. 465. See *Dow v. Saywood*, 14 N. H. 9.

execution against a partner, the creditor may seize the whole property and sell his share.¹

§ 5 a. A, claiming an interest in certain goods of a firm, under a bill of sale by B, one partner, of all his interest in such goods, allowed the other partner, C, to purchase other goods and mingle them all together in the store. Execution was subsequently levied on all the goods, on a *bond fide* judgment against C, and A failed to point out his goods to the officer. Held, equity would not interfere to defeat the judgment.² So equity will not disturb a judgment entered by agreement, in a suit upon a promissory note executed by a firm and another party, against one member of the firm and such other party, it not appearing that the party complaining has been prejudiced thereby.³ And, in order to obtain an injunction against the sale of the property of a partner upon a judgment against the firm; the bill must clearly allege that the action was brought against the firm, or that the judgment was recovered against the parties in the partnership name, and raise this issue. It must also deny that proceedings to show cause have been taken and determined.⁴

§ 6. In analogy with the general rule upon the subject (§ 3), where a creditor of a firm agreed that he would not press his claims at maturity, if each partner would give his own indorsed note for half the amount; and A, one partner, having complied with the condition, but B, the other, not having done so, a suit was brought against the firm: held, A was entitled to an injunction to restrain such suit, until his note should be delivered up to him.⁵ So one part-owner of a steamboat may enjoin the other from selling his share, and subject it to other claims, for which the complainant is liable, and apprehends that, in consequence of the defendant's insolvency, he will be solely liable.⁶ So where, on a dissolution of copartnership between A and B, it was agreed that A should

¹ *Davis v. White*, 1 Houst. (Dela.) 228.

² *Chappell v. Cox*, 18 Ind. 513.

³ *Crenshaw v. Wickersham*, 15 Iowa, 154.

⁴ *Jones v. Jones*, 13 Iowa, 276.

⁵ *Childs v. Horr*, 1 Clark, 432.

⁶ *Thoms v. Southard*, 2 Dana, 475.

take the property, pay off the debts, and indemnify B against them; an injunction was sustained, to prevent the misapplication of the property by A.¹

§ 7. Upon a bill to reach property of a debtor, the fact, that certain stock which he had in a canal company was partnership property, in which another person was interested, and that the stockholders were personally liable for the debts of the company, was held no objection to granting an injunction to restrain him from parting with it.²

§ 8. By agreement of dissolution between partners, A and B, A took the property and agreed to pay the debts. A creditor, having recovered judgment, levied his execution upon the property of both, and afterwards assigned the judgment to C, a relative of A. A then assigned part of the property levied on to D, and C, by a sealed instrument, released his interest therein to D, with full notice of the terms of dissolution. Held, the judgment could not be enforced against B.³

§ 9. As we have suggested, application for the process of injunction is often made in connection with the question of *dissolution*; which latter object has been uniformly held to give an unquestionable right of issuing a preliminary injunction, as auxiliary to the ultimate object of the bill. (a)

¹ Deveau v. Fowler, 2 Paige, 400.

² Bell v. Hall, 1 Halst. Ch. 477.

³ Eager v. Price, 2 Paige, 333.

(a) See Fairthorne v. Weston, 3 Hare (25 Eng. Cha.), 387. As to the prayer for an injunction without dissolution, see Goodman v. Whitcomb, 1 Jac. & W. 592; Kuchell v. White, 2 Y. & Coll. 15; Gow, Partn. 111. It is said, "There are cases where the court will lay injunction or prohibit the dissolution of a partnership." Coll. Partn. § 206. So it is said, "Equity will in case of a partnership, existing during the pleasure of the parties, with no time fixed for its renunciation, interfere (as it should seem) to qualify or restrain that renunciation, unless it is done under fair and reasonable circumstances; for if a sudden dissolution is about to be made, in ill faith, and will work irreparable injury, courts of equity will, upon their ordinary jurisdiction to prevent irreparable mischief, grant an injunction against such a dissolution." 1 Story, Eq. 686, § 668. Under the (Md.) act of 1835, c. 380, § 2, a creditor of a firm may proceed in equity to vacate an assignment by the firm, or some member or members of it, without first obtaining a judgment against the firm for his debt. A bill,

§ 10. In a late case, a partnership was entered into for a special purpose, the delivery of plank stocks at a certain place.

alleging the insolvency of a firm, debtor to the complainant, the appropriation of the partnership property to the private purposes of the partners, to delay and defraud creditors, also the assignment of partnership property, and a dissolution, real or pretended, of the firm, for the purpose of defrauding the creditors, who are in imminent danger of losing their claims; shows ground, under the act of 1835, for granting an injunction and receiver.

The assignment is to be considered under that act totally void, and therefore an injunction should issue to prevent the partnership effects from being sold or disposed of until the rights of the parties shall be settled.

Such an injunction should embrace all the effects included in the transfers among the partners, which are alleged to be fraudulent, which can be found in the control of any partner, and any effects of the late firm held by any partner, by "any conveyance or contract or any other act," not *bonâ fide*.

But under this bill the claimant is not entitled to an injunction in regard to separate property *bonâ fide* such, not held or claimed by individual members of the firm under any fraudulent transfer of property owned by the partnership. *Sanderson v. Stockdale*, 11 Md. 563.

The jurisdiction and powers of a court of chancery are ample to warrant the appointment of a receiver of partnership property, and the issue of an injunction against one partner to prevent his interfering with it. These powers are now vested in the several courts of common pleas of Pennsylvania, by the acts of Assembly of June 16, 1836, and October 13, 1840. During the continuance of a partnership a receiver will not be appointed, merely because of a disagreement, nor even a quarrel between the partners, unless one behave unrighteously towards the other, as by seeking to exclude him from that control over the concern to which he is entitled by the articles of partnership, and the nature of the business.

When a partnership has closed, and the parties cannot agree as to the disposition of the property, and especially when the contract has not provided for this, a receiver will be appointed. So, also, where a distribution is intended, and there is any breach of duty, or of the contract of partnership.

Where a partnership has been formed for a business in which the continued ownership of the property is indispensable, an attempt by one party, without the consent of the other who is present, to dispose of all the property, will be restrained by injunction, at the suit of the other, and, if required, a receiver will be appointed.

The reasons, which warrant the appointment of a receiver, with equal force justify an injunction. *Sloan v. Moore*, 37 Penn. 217.

Bill in equity, alleging a partnership between the plaintiff and A and B, that A and B resided in Connecticut, and that B carried on the business in Baltimore, for a salary; that, at the expiration of the partnership, articles were signed by A and B, the plaintiff tacitly assenting to the continuance till July, 1861; that A had since largely overdrawn his share, and B diminished his share, while the plaintiff had received nothing; that B had conducted the business as his own, denying A any settlement or access to the books, had failed to pay the debts, leaving the plaintiff liable, was appropriating the funds, and threatened to sell out, and was pecuniarily irresponsible. Held, a receiver should be appointed, before answer. *Haight v. Burr*, 19 Md. 130.

Subsequently, the partnership was dissolved, the defendant agreeing to pay the plaintiff for his interest in the timber, at certain rates. A bill was then filed to set aside this contract of dissolution, on the ground of fraud, and praying for an injunction and a receiver. Upon motion to dissolve the injunction, held, that, where a partnership still subsists, to authorize such bill, there must be great abuse or strong misconduct, if not a prayer for dissolution; though, after dissolution, the objection to an injunction and the appointment of a receiver is not so strong, if there be some urgent and pressing necessity. That, upon the motion to dissolve, the court cannot decide that the contract of dissolution is void. This contract transferred the legal title to the defendant, and the court is always reluctant to interfere in opposition to the legal title, and will only do so in case of fraud clearly proved, and of imminent danger.¹

§ 10 a. An injunction, restraining interference with the complainant in the exercise of his rights as a partner of the defendants, will be dissolved, on the clear averment in the answer, that the partnership was dissolved by mutual consent.²

§ 11. Another ground of injunction in case of partnership is thus referred to in a late English case.

§ 12. "This court has jurisdiction to prevent one partner from excluding another from, or from so acting as to prevent the continuance of the partnership according to its terms. If two parties agree to devote their whole time to a partnership concern, this court will not permit one of them to exclude the other from the partnership, or to set up a separate business which makes it impossible that he should perform his partnership obligation; and the bill seeking to restrain the violation of such a partnership contract, though it seeks nothing but an injunction, is, in substance, a bill for a specific performance."³

¹ O'Bryan v. Gibbons, 2 Md. Ch. Decis. 9.

² Per V. C., Shrewsbury, &c. v. Shrewsbury, &c., 1 Sim. N. 422.

³ Van Kuren v. Trenton, &c., 2 Beasl. 302.

And in another case it is said, "Where the parties are partners, and one of the partners contracts that he shall exert himself for the benefit of the partnership, though the court cannot compel a specific performance of that part of the agreement, yet, there being a partnership subsisting, the court will restrain that party (if he has covenanted that he will not carry on the same trade with other persons) from breaking that part of the agreement."¹

§ 13. A and B being partners, A retired from the business, and the amount to be paid him for the good-will was left to arbitration. Upon the verbal understanding that A would not set up the trade on or near the same street, a certain sum was awarded and paid; nothing being said in the award as to thus continuing the business. A having afterwards started the business on the same street, held, he should be restrained by injunction.² So the plaintiff and defendant, having been partners in stage-coaches, agreed upon dissolution that the business, between Newbury and London, should belong to the plaintiff, and that the defendant should not carry on that business between those places. The defendant afterwards started a coach, beginning its route a few miles from Newbury, but passing through Newbury to London. An injunction was ordered against carrying on the business between Newbury and London.³ So the plaintiff and defendant, partners, contracted for the mail, each furnishing horses for a certain part of the way. The defendant having improperly horsed the coach, the postmaster had been often obliged to suspend the contract. Held, it being a case of irreparable injury to the partnership, the defendant should be enjoined from interfering with the plaintiff's part of the road.⁴

§ 14. But the distinction is made, that a *temptation* to abuse the partnership property is not sufficient ground of injunction; though it is otherwise, where a partner pursues a course of great impropriety or folly, and it is highly probable that the

¹ Per Sir L. Shadwell, V. C., *Kemble v. Kean*, 6 Sim. 333.

² *Harrison v. Gardner*, 2 Madd. 198.

³ *Williams v. Williams*, 1 J. Wils. 473 n.

⁴ *Anderson v. Wallace*, 2 Moll. 540.

safety of the firm and the rights of creditors demand such interference.¹ This distinction is illustrated by the following case: —

§ 15. The plaintiff, as one partner in the Morning Herald newspaper, filed a bill against the others, praying for an account, and an injunction to restrain them from using the types or partnership effects and the name of the plaintiff in the publication of the English Chronicle, of which they, but not he, were proprietors. The bill alleged, that he had for many months been excluded from his rights as a partner in the Herald, and that the partnership effects were misapplied, as above stated, intelligence obtained at the expense of the Herald having been first used for the Chronicle and thus become of no value to the Herald; and that his name was used without his consent as publisher of the Chronicle. The answer alleged a failure to account, and indebtedness to the firm, on the part of the plaintiff, in consequence of which they had been compelled to exclude him from interfering in the management of the paper, the defendants being a majority of shares, expressly authorized by agreement to control the minority; that the agreement with the Chronicle was beneficial to the Herald, on account of the sum paid for the use of the effects, and because the Herald had the use of the types composed for new matter in the Chronicle, and had also the general use of the types of that paper. They also relied upon the long acquiescence of the plaintiff. Sir John Leach, V. C., said: “The right of the majority is confined to matters in the conduct of the partnership. — All newspapers are to some extent rivals. — It might, therefore, have been made a question, whether it would be a due act of management in the partnership concern of a morning paper, to assist — any other newspaper, so as to enable the majority — to bind the minority. But that question does not arise, because the plaintiff is a party to the practice before his copartners became the proprietors of the evening paper, and because there is evidence that the proprietors of other morning papers have adopted the same practice — so as to form a sort of usage.

¹ Coll. Partn. § 185, n. 3.

The annual sum paid — outweighs the danger of increased competition. — A considerable part of the expense of a newspaper is occasioned by procuring information ; and if some of the proprietors of a morning paper are also the proprietors of an evening paper, they may have a stronger interest to promote the success of the evening paper than of the morning paper, and a strong temptation to use the information obtained at the expense of the morning paper for the benefit of the evening paper. This temptation forms a powerful objection in all cases to the partner in the concern of one newspaper being permitted to be a partner in the concern of any other. — But it is an objection against which parties may protect themselves by their contracts. In the present case, there is actually a covenant, that the proprietors will not be concerned in any other morning paper," implying "that they might engage in the concern of any evening paper. — Equity would not permit that parties bound to each other by express or implied contract to promote an undertaking for the common benefit, should any of them engage in another concern, which necessarily gave them a direct interest adverse to that undertaking. But the argument here is — that, if their interest be greater in the evening paper than in the morning paper, they are exposed to a temptation to be dishonest. — If they act honestly, it is immaterial to the morning paper whether the defendants are or are not the proprietors of the evening paper." An injunction was allowed, to restrain the defendants from publishing in the Chronicle any information obtained at the expense of the Herald, till first published in the Herald.¹

§ 15 a. In cases of this nature the maxim is applied, that he who seeks equity must do equity. Therefore, when one of two partners in a ferry, who were tenants in common of the land adjacent, died, and his moiety was sold by his administrator, and the purchaser offered to form a partnership with him, and was refused, and afterwards set up an opposition ferry ; a court of equity refused to enjoin him.² So A and B agreed to work a coach from Bristol to London, each fur-

¹ *Glassington v. Thwaites*, 1 Sim. & St. 124.

² *Spann v. Nance*, 32 Ala. 527.

nishing horses for a distinct part of the road. A's horses being seized on execution, B furnished horses for A's part of the road, and subsequently persisted in furnishing horses for the whole route, and claimed the whole profits. A brings a bill for an injunction, but it was not allowed. Lord Eldon said: "If I enjoin the defendant from bringing horses to convey the coaches between the limits in question, I must enjoin the plaintiff from not bringing horses there. I cannot restrain the defendant unless I have the means of assuring him that he shall find the plaintiff's horses ready. I should otherwise enjoin him from doing that which, if he omits to do, he will be liable to actions by every person whom he has undertaken to convey from Bristol to London."¹

§ 16. Where one firm have sold out to another, and agreed with them not to resume the same business in the same place, and afterwards do so resume; a mere prayer for an injunction will be granted, on the application of a single member of the injured firm, the injunction being equally for the benefit of his partners; though it would be otherwise where damages are sought.²

§ 17. In reference to a mere *breach of covenant*, express or implied, without other grounds of interference, it is said, "Although this court will interfere where there is a breach of covenant in articles of partnership, so important in its consequences as to authorize the party complaining to call for a dissolution — it is a matter of great consideration, whether it will entertain the jurisdiction of pronouncing a decree for a perpetual injunction as to a particular covenant, the partnership not being dissolved by the court. There is one case which is constantly occurring, that of a partner raising money for his private use on the credit of the partnership firm; and the court interferes then, because there is a ground for dissolving the partnership; but then the danger must be such, there must be that abuse of good faith between the members of the partnership, that the court will try the question whether the partnership should not be dissolved. But where one party

¹ Smith v. Fromont, 2 Swanst. 330.

² Beard v. Dennis, 6 Ind. 200.

violates a particular covenant, and the other party does not choose to put an end to the partnership, there may be a separate suit, and a perpetual injunction in respect of each covenant; that is a jurisdiction that we have never decidedly entertained.”¹ Conformably with these views, equity will not interfere by injunction on the application of one partner against others, with reference to the names used in the partnership business, on the ground of a breach of covenant, where such breach has not been long continued; no dissolution of the partnership being prayed for. And it is doubted, whether even in that case an injunction would be granted.² But a surviving partner may enjoin the executor of the deceased partner from using the partnership name in carrying on the business.³ So an injunction was granted, to restrain a partner, who had abstracted a firm-book from the counting-house, in violation of a covenant, from continuing such violation.⁴ So, after dissolution, equity will restrain one partner from publishing the letters of another relating to the joint business, unless demanded by civil or criminal justice.⁵ And, in general, it is said: “Courts of equity construe the articles strictly, and do not permit the business to be extended by any of the partners, without the consent of all of them, either express or implied, to any other business or branch of business, of a different nature, extent or kind; and if it is attempted they will interpose by way of injunction.”⁶ While, on the other hand, “courts of equity, in interfering by way of injunction in cases of partnership act upon a sound discretion, and will not interfere on the ground of breaches of duty, unless they are of such a nature as may produce permanent injury to the partnership, or involve it in serious perils or mischiefs in future. A mere fugitive temporary breach, involving no serious evils or mischiefs, and not endangering the future success and operations of the partnership, will, therefore, not constitute any case for equitable relief. Equity will not interfere in cases of frivolous vexation, or for mere differences of temper, casual disputes, or other minor grievances.”⁷

¹ Per Lord Eldon, *Marshall v. Colman*, 2 Jac. & W. 266. See 3 Kent, 61.

² *Marshall v. Colman*, 2 Jac. & W. 266.

³ *Lewis v. Landor*, 7 Sim. 421.

⁴ *Taylor v. Davis*, 3 Beav. 387, n. e.

⁵ *Roberts v. M’Kee*, 29 Geo. 161.

⁶ Story, *Partn.* 289, § 193.

⁷ Story, *Partn.* 328-31, § 225.

§ 17 a. The plaintiff had an agreement with the defendant, by which at a future day certain he was to enter into business with the defendant and share the profits. The defendant, prior to that day, still conducting his business for his own benefit, declared that he would repudiate this contract when the time of fulfilment should come. Held, no ground for an injunction, before the day fixed; and this notwithstanding an averment of the defendant's irresponsibility.¹

§ 18. The general positive misconduct of a partner in reference to the partnership business is ground for injunction, more especially in connection with a prayer for other relief. Thus a bill was filed by A and B, partners in a brewery, charging great misconduct in C, the defendant, another partner, in disobliging and turning away the customers, inducing servants to quit, assaulting and obstructing them, locking up the books, retaining as servants, without consent of the plaintiffs, bruisers and boxers who obstructed the trade, threatening to ruin the business, and refusing to account. The bill prayed for a valuation and division of the stock and utensils, at the end of the partnership, and for an injunction, against any act to obstruct or injure the trade. On motion, after answer, for an injunction, ordered, that the defendant be restrained from using force, either by himself or any other person, to the obstruction of the trade, from obstructing or removing the servants, and removing from the counting-house any books or papers concerning the trade. And the plaintiffs, upon their submission, were enjoined in like manner. So the plaintiff and defendant were bankers, and partners under a parol agreement. The defendant introduced Newnham, a friend of his, to keep cash with them; and contrary to the opinion and desire, and without the consent of the other partner, permitted him to draw upon the partnership; and directed his bills to be paid out of the joint property; by which he became considerably indebted to the partnership. Newnham executed bonds to the defendant only. A balance of above £5,000 remained due from Newnham, with respect to which he referred the plaintiff to the defendant; who said, the bank had no demand against

¹ Redfield v. Middleton, 7 Bosw. 649.

Newnham. Bill, praying for an account, dissolution, and that the defendant might be restrained from executing securities in the name of the firm without the plaintiff's consent. A demurrer to so much of the bill as prayed for a dissolution was overruled.¹

§ 19. It is said, in an approved work, that an injunction may be had against one who has colluded with a partner.²

§ 20. We shall hereafter (Chap. XXX.) have occasion to consider the application of injunctions, to restrain the negotiation of bills of exchange and promissory notes, generally. As illustrative of the point of *collusion*; whether an injunction will be granted against the negotiation of a bill or note given by one partner in the name of the firm for his separate debt, seems to depend upon the consideration, whether the party taking such security had reason to suppose that the partner had the right or authority thus to use the name of the firm. Lord Eldon regarded the remedy as applicable, where a partner, indebted to the firm, and unable to pay his separate bill held by his bankers, substitutes for it, by a negotiation with them, a partnership security, made and given without the knowledge or consent of the other partners, the bankers knowing it to be thus executed.³ So where one partner, holding notes for the benefit of the firm, attempts to pawn or pledge them for his own private debts, the court will restrain it as an act contrary to the laws of Pennsylvania, and a fraud on his copartners.⁴ So a judgment obtained against A on a note signed in the name of the firm, A and B, of which he had been a member, will be enjoined, where the note was given by B for his individual debt, contracted before formation of the partnership, and where this defence could not, by ordinary diligence, be made at the trial.⁵ So, an injunction having been granted against the defendant White, a motion was made for the purpose of continuing the injunction, after the answer came in, and to extend it to the defendant Bolt; who was

¹ *Master v. Kinton*, 3 Ves. 74.

² *Coll. Partn.* § 340 n.

³ *Hood v. Astor*, 1 Russ. 415.

⁴ *Stockdale v. Ullery*, 37 Penn. 486.

⁵ *Baltzell v. Randolph*, 9 Flori. 366.

connected with the other defendant by marriage ; and had received from him a bill or note, for £5,500 drawn or accepted in the name of the partnership, and, according to the plaintiff's affidavits, negotiated to Bolt immediately, while the order for the injunction was making, in consideration of a debt, due from White previously to the commencement of the partnership. Bolt had brought an action and denied notice. The defendants contended that the case should be tried at law ; but Lord Eldon overruled the objection, remarking upon the change of practice in regard to sending cases to be tried at law, and also that " the dates and other circumstances, which may be very material, as to the *bona fides* with which Bolt received this bill, are very loosely stated in the answer." Afterwards by a farther answer, put in upon exceptions, Bolt submitted to the relief prayed against him ; and by consent the bill, which had been deposited with the master, was delivered up to the plaintiff to be cancelled ; and Bolt was ordered to discontinue his action.¹

§ 21. More especially, a partner who has involved the firm, or himself become insolvent, will be enjoined from drawing, indorsing, and accepting bills in the firm name, and from receiving the partnership debts.²

§ 22. A and B entered into partnership, and, A having advanced the capital, B gave him his (B's) note for his share. The firm afterwards became insolvent, and surrendered the partnership effects to assignees ; but A retained B's note, which he afterwards transferred, overdue. Held, the transferee took the note subject to an account between A and B, and, B having paid more than his share of the partnership debts, and A being insolvent, the collection of the note was enjoined.³

§ 23. An allegation in a bill in equity, that one defendant claims to have been in partnership with a party deceased, that

¹ *Jervis v. White*, 7 Ves. 412-3-4.

² *Peck v. Wakely*, 1 McC. Ch. 43.

³ *Williams v. Bingley*, 2 Vern. 278, Raithby's note.

the other defendant, the administratrix, denies such partnership, and that the complainant himself is ignorant of the state of the case ; is not "an averment of partnership" sufficient to authorize orders for an injunction and a receiver.¹ So where the representatives of a deceased partner had enjoined the surviving partner from selling the joint property at public sale ; held, the injunction should be dissolved, there being no charge of fraud, insolvency, or misconduct against the survivor, but a mere allegation of a refusal to account, and no proof that the account had been withheld an unreasonable time.²

§ 24. A firm, being indebted to A, agreed that B, one of the firm, should take a lot of land and pay the debt of A. The land was conveyed to A, to hold until B should pay him ; and A leased it to B at a rent which would in six years pay the debt. When the first rent fell due, A distrained slaves of B, on the premises, which B had before the transaction mortgaged to C, to secure a debt. C filed a bill against A and B, to restrain the sale under the distress, and have them applied to his debt, and charging a combination between A and B to defraud him of his debt, and also alleging the sufficiency of the land to pay A's debt. Pending the bill, the slaves were sold on motion of A, and the money placed in the hands of a receiver. A then objected to the jurisdiction of the court. Held, the charge of fraud authorized the bill ; also the charge that the land was sufficient to pay A's debt, on the principle of marshalling assets ; and A had waived objection to the jurisdiction by moving for the sale of the slaves.³

§ 25. An injunction was granted, on the application of one partner, against the other's receiving any more of the partnership funds, and a receiver appointed ; the latter being in contempt, and not appearing after personal service.⁴ But where a partnership is dissolved by the *bond fide* sale of partnership property, under a separate execution against one of

¹ Guyton v. Flack, 7 Md. 398.

² Shad v. Fuller, Charl. R. M. 501. 441.

³ Henley v. Perkins, 6 Gratt. 615.

⁴ Read v. Bowers, 4 Bro. Ch. 326,

the partners, the court will not interfere with the other partner in settling the concerns, and grant an injunction, or appoint a receiver, unless there be some breach of duty on the part of the acting partner.¹

§ 26. The principles, that an injunction should not be granted unless there is danger of irreparable loss, and that a prayer for equitable relief comes too late after a judgment at law, have no application to a bill in equity for an account and settlement of a copartnership, brought by one of the partners, who alleges that he was the lessee of the partnership property, and had paid out more than he had received; and that another partner, who held the legal title to the property, which equitably belonged to the company, had recovered judgment in ejectment against the complainant, both for the premises and for mesne profits.²

§ 27. Bill, to restrain a suit on a bond, in favor of surviving partners against the representatives of a partner deceased. It appeared, that the articles of partnership provided for an annual settlement, and for payment to the representatives of one deceased of an allowance in lieu of profits since the last annual account, proportioned to the amount of his share of profits during two years next preceding. The suit was brought for repayment of the share of the partner deceased, according to the articles. But it appeared that the parties had omitted for several years to settle the annual accounts, and had engaged in business to which the agreement was not equitably applicable; and an injunction was ordered upon the prosecution of the suit, before settlement of transactions pending at the death of the deceased partner, which resulted in a loss.³

§ 28. The plaintiff had received money by bill of exchange which belonged to the defendant, but detained it upon pretence of some accounts between them, and, being sued at law, brings a bill to stay that suit, and on account of the defend-

¹ *Renton v. Chaplain*, 1 Stockt. 62.

² *Wells v. Strange*, 5 Geo. 22.

³ *Jackson v. Sedgwick*, 1 Swanst.

460.

ant's alleged insolvency the money was brought into court. Prayer for relief, upon an agreement made at the termination of a partnership; for the plaintiff, being at Leghorn, had entered into a partnership with Lee and Canham, in thirds, and being desirous to break off, it was agreed that 27,000 pieces of eight should be paid the plaintiff, which was done; and that the plaintiff should be indemnified from any trouble growing out of the partnership, and in 1664 an instrument was executed accordingly. After this, the plaintiff formed a new partnership with James and John Gold, and was forced by sentence of the court at Florence to pay custom to the Great Duke for goods imported during the former partnership, and is also sued by Mico for a partnership debt. To which the defendant said that there were no customs due after seven years, and that Mico's pretences were groundless, and that there had been a reference of all differences to arbitrators, before whom the matter of the customs was not stood upon. Cur. 1. Let the plaintiff receive back so much of the money brought into court as may be adequate to the sum paid on the sentence for custom, the justice whereof is not examinable here. 2. Let the defendant take the rest, subject to the covenants of saving the plaintiff harmless against Mico, &c.¹

§ 29. It is ground for injunction that A, one of the defendants, has agreed to do a specific thing, and B, the other defendant, holds a covenant of A, taken in behalf of the plaintiff, according to a prior understanding, and also holds a specific fund, which puts it in the power, and makes it the duty, of one of the defendants to see that the agreement is carried into effect by the other; the plaintiff alleging that B intends to pay out the fund contrary to the understanding.²

§ 30. Equity cannot restrain one joint devisee or one tenant in common from entering upon the land, at the suit of another.³

§ 31. One tenant in common may enjoin another from cut-

¹ Gold v. Canham, 2 Swanst. 343 n.;
¹ Cas. in Ch. 311.

² Ashe v. Johnson, 2 Jones, Eq. 149.
³ Baldwin v. Darst, 3 Gratt. 132.

ting saplings and any timber trees or underwood at unseasonable times, which the law regards as *destruction*; but not pure *equitable waste*, as in the cutting of timber generally. Lord Eldon says: "I never knew an instance of an application to stay waste by one tenant in common against another, one tenant in common having a right to enjoy as he pleases."¹ But in a later case it is held, that, if one co-tenant, while in possession of the whole estate by consent of the others, threaten to commit wilful waste, which would work irremediable mischief, he may be restrained by injunction.² (See *Waste*)

§ 31 a. Complainants were owners of all the franklinite and iron ores found separate from zinc upon a certain tract, and claimed all such ores whether found so separate or not. Defendants owned the zinc and all the other ores on the tract, and claimed to own the franklinite and iron ores when not separate from the zinc ores. Upon bill filed, an injunction had been allowed, restraining defendants from mining, carrying away, or using any franklinite or iron ore. It appeared, that the ores were found combined in such varied proportions, as to render it often difficult to decide which metal preponderated in quantity or value in any given specimen, and to render it difficult or impossible to mine either ore without the other. On motion to dissolve the injunction, on the ground that the whole equity of the bill was denied by the answer, it was held: (1.) That the dispute was not as to the facts, but that it was a question of the legal construction and proper interpretation of the grants of the mining rights. (2.) That the matters in controversy were not of such a nature that they could be met and denied by the answer, so as to entitle the defendants to a dissolution of the injunction, as a matter of course.³

§ 32. After a lease to a railroad company from five out of six tenants in common, at a rent three times as large as the former rent, the company, against the wishes of A, the remaining tenant, who, in the language of the court, "kept the company at arm's length," made a railroad upon the land, which

¹ *Hole v. Thomas*, 7 Ves. 589.

² *Twort v. Twort*, 16 Ves. 128.

³ *Boston, &c. v. New Jersey, &c.*, 2 Beasl. 215.

at law was held an ouster. Held, A should not be enjoined from removing the rails.¹

§ 33. An injunction lies to restrain the sailing of a ship, until security is given in behalf of one one-part owner against the others, where the respective shares are not apparent and their amount is a subject of dispute, and for this reason the Court of Admiralty would decline to interfere. But the plaintiff must have acted promptly.²

¹ *Durham, &c. v. Wawn*, 3 Beav. 119.

² *Haly v. Goodson*, 2 Meri. 77; *Christie v. Craig*, Ib. 137.

CHAPTER XXII.

OFFICERS. (a)

§ 1. EQUITY has undoubted jurisdiction to interfere by injunction, where *public officers* are proceeding illegally and improperly, under a claim of right, to do any act to the injury of the rights of others.¹ Either of two conflicting bodies of men, claiming to hold one and the same office, at one and the same time, may apply to this court for an injunction to restrain the other from usurpation of powers to which it is not entitled.² “It is not the mere fact that a public officer is attempting to exercise a void authority which induces a court of equity to restrain him ; but, notwithstanding he is a public officer, that he is about, by such exercise, to do an act which brings the case within its peculiar jurisdiction ; for example, an act in breach of trust, in derogation of a contract which ought to be specifically performed, or an act of irreparable mischief to the real estate of another.”³

§ 1 a. “The limits within which this court interferes with the acts of a body of public functionaries are perfectly clear and unambiguous. So long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, this court will not interfere. The court will not interfere to see whether any alteration or regulation which they may direct is good or bad ; but if they

¹ *Cooper v. Alden*, Harring. Ch. 72 ; *Conover v. Mayor, &c.*, 25 Barb. 513 ; *Mohawk, &c. v. Archer*, 6 Paige, 83 ; *State v. Jarrett*, 17 Md. 309.
Baltimore v. Porter, 18 Md. 284. See ² *Kerr v. Trego*, 47 Penn. 292.
Tunstall v. Boothby, 10 Sim. 542 ; ³ Per Ames, J., *Greene v. Mumford*, 5 R. I. 475.

(a) It is held in a late case, that the Supreme Court of the United States can not enjoin the President from executing an act of Congress, on the ground of unconstitutionality ; and this, although he is not described as President. *Mississippi v. Johnson*, 4 Wall. Law Reg., August, 1867, p. 632.

are departing from that power which the law has vested in them — if they are assuming to themselves a power over property which the law does not give them — this court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority.”¹ Thus, one alleging himself to be a citizen and resident of the county, and as such interested in the public welfare, may enjoin a public officer from the commission of a public wrong.² So the magistrates of a county proposed to cut the timbers supporting the roadway of a bridge, which timbers and roadway, at the place to be cut, were within their jurisdiction, but the other extremity in another county. Held, a case for injunction, on a bill filed jointly in favor of the attorney-general and relators, inhabitants of the county.³ So while A was in possession and exercise of an office, B ousted him, acting under a commission from the governor; whereupon A brought an action of *quo warranto*, on the ground of the illegality of the commission. Held, that, pending such action, this court, in view of the defendant’s insolvency, might grant an injunction to prevent him from receiving the fees and emoluments of the office, until the decision.⁴ So a court of chancery may restrain, by injunction, a special commissioner in chancery from executing a decree of sale.⁵ So where a plan for the drainage of a swamp, under the New York act “for draining swamps and bog meadows in the counties of Orange and Dutchess” (Sess. 27, chap. 91), proposed by the inspectors, exceeded their powers, and would have been to the injury of the plaintiff’s mill, their proceedings were enjoined.⁶ So an injunction lies in favor of citizens of a county to restrain a board of supervisors from re-locating a county seat, under authority of a pretended election for that purpose; upon the allegation that there was no law authorizing such removal.⁷ So a treasurer may be enjoined

¹ Per Ld. Chanc., *Frewin v. Lewis*, 4 My. & Cr. 254.

² *Collins v. Ripley*, 8 Clarke, 129.

³ *Atty.-Gen. v. Forbes*, 2 My. & Cr. 123.

⁴ *Tappen v. Gray*, 3 Edw. Ch. 450.

⁵ *The People v. Gilmer*, 5 Gilman. 242.

⁶ *Belknap v. Belknap*, 2 John. Ch. 463.

⁷ *The Board, &c. v. Keady*, 34 Ill. 296.

from paying out money raised for an illegal purpose, but without costs.¹ So where A, claiming an election as sheriff, was commissioned by the governor, and a suit brought to test the validity of the election was decided in favor of B, the contestant; and thereupon, pending a *certiorari*, the governor issued another commission to B: held, an injunction would issue to restrain B from interfering with the office.² So highway commissioners, having a right to lay out a highway across the track of a railroad, have no right to lay it out over the site purchased by the company for their engine-house, &c.; and an injunction will lie, to restrain them from taking possession of such site.³ So an injunction, which directs the county judge not to remove the county offices and records, is not in conflict with a mandamus, which directs him and other members of the canvassing board to canvass the election returns on the question of such removal, and to declare the result.⁴

§ 2. But where supervisors have jurisdiction to review the orders of commissioners of highways on appeal, and proceed regularly in the exercise of such jurisdiction, equity will not interfere with their action.⁵ So the inclosure commissioners, under the general inclosure act, 8 & 9 Vict. c. 118, having made provisional orders, and being about to confirm the valuer's report, pursuant to a local act, a bill was filed, alleging certain lands in the report to be lands not subject to inclosure, and praying an injunction. The lands being commonable, held, the court had no authority to restrain the commissioners from making their award.⁶ So an election having been improperly held, of a common pleas judge, the court refused to enjoin the governor from commissioning the party elected, and the latter from accepting the office.⁷ So one who had been, and still claimed to be, the State comptroller, brought an information, and prayed for an injunction, against a rival claimant and the State treasurer, on the ground that, by means of that claim, and of the acts and threats of

¹ Fiske v. Hazard, 7 R. I. 438.

² Ewing v. Thompson, 43 Penn. 372.

³ Albany, &c. v. Brownell, 24 N. Y. Eq. 521.
(10 Smith) 345.

⁴ Dishon v. Smith, 10 Iowa, 212. See
Union, &c. v. Sanders, 1 Houst. 100.

⁵ Gray v. Lott, 18 Ill. 251.

⁶ Turner v. Blamire, 19 Eng. Law &

⁷ Beal v. Ray, 17 Ind. 554.

the treasurer in support of it, the fiscal interests of the State were placed in imminent hazard. Upon a distinct and positive denial of all this by the rival claimant, the court refused to grant the injunction.¹ So where a sheriff was absent from his county for more than a month on necessary business, with an intention of returning by a given time, it not appearing that he was insolvent; it was held, that the fact of a deputy's having applied a portion of the taxes of a given year to a judgment against him (the sheriff), for the taxes of a preceding year, without being instructed so to do by the sheriff, was not a sufficient ground for the sureties of that year to have an injunction to restrain the sheriff from paying the taxes of that year, otherwise than as the law directs.² So, pending a suit to test the right to a State office, an injunction will not be granted to restrain the incumbent from discharging his duties, when the petitioner does not show that any injury would result to him if his application is denied.³ So an injunction does not lie against registrars of votes, who have misconceived their duty or violated their trust by proposing to applicants improper questions.⁴ Nor against officers of registration, as holding other offices, upon the ground of unconstitutionality. Or, at any rate, the bill must show by exhibits such concurrent holding of offices.⁵ Nor, in general, to decide a question of political duties, especially in a doubtful case.⁶ Nor for refusal of a vote. The remedy is at law. And the joinder of several plaintiffs does not furnish ground of injunction.⁷ Nor against commissioners of mill-dams, for failure to take an oath of office.⁸

§ 3. An injunction will not issue to eject a clergyman, once regularly settled, from a church, merely at the wish of the vestry, there being no conflict, or pretence or expectation of conflict, between him and another claiming the office, or their adherents.⁹ So the only ground of injunction, to restrain a bishop from passing sentence against a priest, is, that he may

¹ *State v. Jarrett*, 17 Md. 309.

² *Mitchell v. Ward*, 6 Jones, Eq. 66.

³ *Terry v. Stauffer*, 17 La. An. 306.

⁴ *Hardesty v. Taft*, 23 Md. 526.

⁵ *Ib.* 529.

⁶ *Ib.* 530.

⁷ *Ib.*

⁸ *Miller v. Craig*, 3 Stockt. 175.

⁹ *Youngs v. Ransom*, 31 Barb. 49.

affect the civil rights of the priest. Where such ground exists, the only cognizance which the court will take of the case is, to inquire whether there is a want of jurisdiction in the bishop — whether he has power to act, not whether he is acting rightly; and objections not made at the trial of the priest will be considered as waived.¹ But in a suit for specific performance of an agreement for the sale of the next presentation to a living, the court will restrain the bishop from taking advantage of a lapse pending the suit.² So an injunction lies, to restrain the Archbishop of Dublin from collating, by way of lapse, to a deanery, pending a suit in the Consistorial Court, respecting the presentment by the chapter.³ So where the Archbishop of Canterbury devised to the defendants and others all options which should fall, in trust, to present his son, the plaintiff, in the first place; and, a vacancy having occurred, the defendant procured himself to be presented for installation and induction: the plaintiff filed a bill, and on motion obtained an injunction, to prohibit the bishop from inducting the defendant or any other person, till answer and further order.⁴

§ 4. An officer of court, who has obtained authority from it to sue, is not only authorized, but bound, to proceed with his action, and is not to be restrained by injunction out of another court, or by making him a party to a new action, and obtaining an injunction against him, but by application to the court, whose officer he is, for instructions.⁵

§ 5. A bill in equity will not lie to compel the clerk of the court to issue an execution on a money judgment, as there is a perfect remedy by action on his bond.⁶

§ 6. Pending proceedings in the nature of *quo warranto*, to determine the right of the incumbent of a certain office, an injunction will not be granted to restrain him from discharg-

¹ Walker v. Wainwright, 16 Barb. 486.

² Nicholson v. Knapp, 9 Sim. 326.

³ Daly v. Archbishop, &c., Flan. & Kel. 263.

⁴ Potter v. Chapman, Dick. 146; Ambl. 98.

⁵ Winfield v. Bacon, 24 Barb. 154.

⁶ Goodwin v. Glazer, 10 Cal. 333.

ing its duties during such pendency, and until the validity of the law under which he holds the office is decided.¹ So a bill in equity for an injunction, to restrain borough officers from entering upon official duties under an alleged appointment of the town council, will not lie, though they had not exercised or attempted to exercise the duties of their offices: the remedy is at law, by *quo warranto*, and to be invoked after entry into, or exercise of authority under, their appointment.² So a court of chancery has no jurisdiction to enjoin a flour inspector, who entered upon the discharge of his duties under color of an appointment by the governor, made during a recess of the Senate; or to appoint a receiver of the fees and emoluments, until the rights of the former inspector, who claimed to hold over, and of the defendant, could be determined at law, although the latter is insolvent.³ So neither the Supreme Court nor a judge in vacation has any authority, under the statutes of Indiana, to make an order, by way of injunction, requiring the incumbent of an office, although his term has expired and his successor has been duly elected and qualified, to transfer and deliver to his successor the appurtenances of the office.⁴

§ 7. Under (California) Sts. May 1, 1855, and March 26, 1851, the commissioners have, by express terms, no authority as to land outside the boundaries there specified; therefore their sale of lands outside can give no color of title, and so cannot be enjoined.⁵

§ 8. In case of contest between two sets of trustees as to an election, a temporary injunction should not issue against those in possession, unless they threaten some special injury, beyond their mere incumbency, *pendente lite*.⁶

§ 9. One claimant of a military office cannot have a perpetual injunction against another, until the title of the latter has been directly put in issue and expressly adjudged invalid,

¹ *People v. Draper*, 24 Barb. 265.

² *Updegraff v. Crans*, 47 Penn. 103.

³ *Tappan v. Gray*, 7 Hill, 259.

⁴ *Markle v. Wright*, 13 Ind. 548.

⁵ *Kisling v. Johnson*, 13 Cal. 56.

⁶ *Hartt v. Harvey*, 32 Barb. 55.

thus exempting him from liability for disobedience to superior officers.¹

§ 10. The plaintiffs belonged to a club, consisting of those who had been parochial overseers of the poor. The society had long been in possession of a silver tobacco-box, inclosed in two large silver cases, all of which were adorned with engravings of public transactions and heads of eminent individuals, affixed, periodically, for a long prior period. These articles were always kept by the overseer for the time, to whom, upon his coming into office, they were delivered by the church-warden, with a charge, under a penalty, to produce them at all meetings, and to deliver them, on leaving office, to the senior church-warden, to be by him delivered to the succeeding overseer. One of the defendants, on becoming overseer, received them in the usual form. On going out of office, he refused to surrender them unless the vestry would pass his accounts, in which they had refused to allow certain payments. A meeting was then called, and it was resolved by the members attending that legal steps should be taken, and, after some negotiation, an action was brought and the defendant arrested. Two of the nominal plaintiffs in that action executed a release to the defendant, who thereupon delivered the box to one of them. A bill in equity was then brought against the parties releasing and the party taking the release to have the articles delivered up. Held, although there was a clear remedy at law, yet, upon the grounds of a trust, and of the peculiar nature of the property, the bill should be sustained.² (a)

¹ *People v. Sampson*, 25 Barb. 254.

² *Fells v. Read*, 3 Ves. 70.

(a) In New York, upon the removal, or expiration of the term, of an officer, it is a misdemeanor for him to refuse to deliver to his successor, on demand, all the books and papers of office. 1 R. S. 124. If the title is clear, such delivery may be compelled by law. Otherwise there must be a proceeding in the nature of *quo warranto*. *Ib.* 51; Code, § 428; *The People v. Stevens*, 5 Hill, 616.

CHAPTER XXIII.

SUBJECTS OF INJUNCTION — TRUSTS.

§ 1. HAVING treated of the *grounds* for, and the *parties* to, the process of injunction, we now proceed to consider the *subjects* in reference to which this remedy is ordinarily invoked ; remarking, however, that its most distinguishing feature, as part of the flexible and remedial system of equity jurisprudence, is its applicability and adaptation to *any and all* subjects which may happen to give occasion to injuries not susceptible of legal redress.

§ 2. *Trusts* being a peculiar subject of equity jurisdiction, of course no more frequent occasion arises for the process of injunction, than to regulate the disposition of trust property. Thus equity will enjoin a party holding land in trust from parting with his control over it.¹ So where a trustee, appointed by deed of A to collect money and pay all the debts of A, resides in a distant State, and a bill by a creditor alleges that he is about to remove the trust funds beyond the reach of the court ; an injunction is proper, to restrain such removal.² So where *cestuis que trust* were empowered by the trust deed to change the investment of the trust fund, they were enjoined from making any change in such investment, or interfering with the income or profits, without the sanction of the court on notice to their creditors.³ So where the trustees of a chapel were proceeding to mortgage it for a small sum without any apparent necessity, the court granted an injunction to the plaintiff, undertaking to abide any order which the court might make as to the payment of the debt proposed to be

¹ *Hun v. Freeman*, 1 Ham. 490.

² *North Am. Coal Co. v. Dyett*, 7

³ *Symons v. Reid*, 5 Jones, Eq. 327. Paige, 1.

secured.¹ In the case of *Atty.-Gen. v. The Mayor, &c., Wood, V. C.*, said: "You cannot, without previous consent of this court, apply any funds which may be in your hands appropriated by an act of Parliament to the given purposes of that act, for the extension of those purposes, although it is purely and *bond fide* an extension of those purposes, or a more enlarged application of it to those purposes. — Considering this money is trust-money applicable to a specific purpose, you, the trustee, must come to this court."² So, A having conveyed property in trust for the payment of certain judgments which were a lien on such property, B, a *bond fide* purchaser from the trustees, files a bill against C, an assignee of some of the judgments, for an injunction, charging that the judgment creditors had notice of, and assented to the trust, and intended to rely for payment upon the proceeds of the land sold under it. C answered that he had no personal knowledge of the plaintiff's equity, and denied, upon information, the facts alleged. Held, the answer was not sufficient to dissolve the injunction.³ So a trustee may be enjoined from submitting to arbitration a question in which the *cestuis* alone are interested, without their consent.⁴ So the legislature has power to convey a fund, granted by the United States for internal improvements, to trustees, to be held by them in pledge for the payment of interest on bonds issued by certain railroads; and, after such conveyance, it cannot divest such fund, by directing the trustees to appropriate it to other objects; and a holder of the bonds, in case of such an appropriation has a remedy by injunction.⁵ So where a bond is taken from a trustee, under an order of the Court of Equity, payable to the clerk and master, conditioned for performance of the trust; the representative of the *cestui que trust* has no right to sue on such bond, without leave of court, and the court will enjoin such suit until an account of the trust can be taken.⁶

§ 3. But the court will enjoin a sale by fiduciary vendors

¹ *Rigall v. Foster*, 23 Eng. Law & Eq. 71.

² 23 Eng. Law & Eq. 361.

³ *Doub v. Barnes*, 4 Gill, 1.

⁴ *Crum v. Moore's, &c.*, 1 M'Cart. 436.

⁵ *Trustees, &c. v. Bailey*, 10 Flori. 112.

⁶ *Floyd v. Gilliam*, 6 Jones, Eq. 183.

only upon strong grounds, and for irreparable injury or a clear breach of trust.¹ Thus the court refused to stay a sale by trustees, although to be made the next day, and although the notice was unusually short, it not being a case of irreparable injury, and the trustees being liable to the *cestui* for any damages which might result from a breach of trust.² And a trustee, having a naked title in land, cannot be restrained from asserting or conveying such title, or compelled to convey it to a purchaser from the *cestui*, without proof of a written agreement, or joining the *cestui* in the bill.³ So, in Maryland, a party holding a lien on land, based on a conveyance to trustees for his security, is not entitled to an injunction to prevent a judgment creditor of the grantor, whose judgment is subordinate to the lien, from enforcing his judgment by the sale of the lands on execution. The execution would operate only on the equitable interest of the judgment debtor, and would leave the prior lien unaffected both at law and in equity.⁴ So A executed a document, attested by two witnesses, giving and granting to B, his wife, a freehold house in which they resided. A afterwards died intestate, and his heirs at law brought ejectment for the house and premises against B and obtained a verdict, upon which B filed this bill. Upon motion to dissolve an injunction, held, the gift was incomplete, the relation of trustee and *cestui que trust* was not created, and the court would not assist either party, but leave them as it found them, and the injunction was dissolved.⁵ So an injunction of the sale of homestead property by a trustee under a deed of trust, on the ground that other property of the owners, liable to execution, has not been exhausted, will not be granted, in default of an averment or showing that the complainants have such other property.⁶

§ 4. In reference to the peculiar form of trusts termed *charities*, in the case of *Atty.-Gen. v. The Foundling Hospital*, Lord Commissioner Eyre said, he had “not a doubt that the court had a jurisdiction over charities, and that where

¹ Dart on Vend. & P. 38.

² Pechel v. Fowler, 2 Anstr. 542.

³ Richards v. Richards, 9 Gray, 313.

⁴ Union, &c. v. Poultney, 8 Gill & J. 324.

⁵ Price v. Price, 8 Eng. Law & Eq. 271.

⁶ Stevens v. Myers, 11 Iowa, 183.

they are founded in charters, or by act of Parliament, and a visitor appointed, or where trustees or governors abused their trust, the court could take notice of such abuse ; not in the character of a charity, but as an abuse of a trust ; but that where the management of a charity was intrusted to governors or guardians by the charter or act of Parliament, such governors had a right to exercise their discretion ; and that, as to opinion, although the court should be of a different one from such governors, it would not set up that opinion against the discretion of the trustees." In conformity with these views the court refused to restrain the governors of the Foundling Hospital from building on the charity estates.¹

¹ 4 Bro. Ch. 121, 165.

CHAPTER XXIV.

TAXES.

§ 1. Few subjects have given more frequent occasion of application for the process of injunction, than *Taxes*. It will be seen that the decisions are by no means reconcilable.

§ 1 a. On the one hand it is held, that an injunction lies against a tax which is illegal, or laid for fraudulent purposes.¹ (a) Thus after a decision by the Supreme Court, that certain property is exempt from taxation, injunctions may issue to prevent tax assessments, in order to prevent a multiplicity of suits. And though tax deeds of the land would be void, yet they would be a cloud on the title, and the issuing them may be restrained.² So an injunction may be allowed, to stay a sale for taxes on city lots assessed by a city government.³ Or the collection of a special tax levied without authority of law.⁴ Or a sale for taxes by an officer without legal authority.⁵ So where taxes are illegally assessed upon land, under a drainage act, and the auditor-general has given deeds of the land under a sale for such taxes; the deeds are *prima facie* evidence of regularity in the assessment and subsequent proceedings, and create a cloud upon the title which authorizes the remedy by injunction.⁶ So the impending sale of land by a commissioner of streets, for an illegal tax for grading, may be enjoined at the suit of the owner, an abut-

¹ *Smith v. Myers*, 15 Cal. 33; *Ottawa v. Walker*, 21 Ill. 605. See *Adams v. Castle*, 30 Conn. 404.

² *Morris, &c. v. Jersey, &c.*, 1 Beasl. 227; *Mitchell v. Milwaukee*, 18 Wis. 92.

³ *Burnet v. Cincinnati*, 3 Ham. 72.

⁴ *Culbertson v. Cincinnati*, 16 Ohio, 574; *Vanover v. Davis*, 27 Geo. 354.

⁵ *Fremont v. Boling*, 11 Cal. 380.

⁶ *Palmer v. Rich*, 12 Mich. 414.

(a) In Massachusetts (Gen. Sts. c. 18, § 79) the court is authorized on petition of ten taxable inhabitants to enjoin the illegal raising of money by a town or city.

ter.¹ So upon a bill, alleging that the defendant, who was insolvent, claimed certain lands by a deed under an irregular sale of a tax-collector; that he was threatening and he and others were preparing for waste and trespass; that the complainants had been disturbed and were likely to be still more seriously in the enjoyment of the land, and deprived of its profits: the deed appearing in form to be valid, held, an injunction should be granted, and the deed cancelled.² So, in Pennsylvania, the county treasurer may be restrained from selling unseated land for taxes, where the owners have paid the taxes to the supervisors, and they have been returned to the commissioners.³ So the collection of a road-tax by suit will be enjoined, where the supervisors have given no notice to non-residents, or opportunity to work out their taxes, by themselves or their tenants; notwithstanding the general rule of non-interference, where the right is doubtful, or where the party has a remedy at law.⁴ So an action was brought to restrain a county treasurer from advertising real estate in a school district, for a tax assessed to pay certain judgments, and to have the judgments declared void, as obtained upon illegal and forged school orders, and because the director of the district, though notified of the suits, did not defend them, but suffered the judgments, with intent to defraud the tax-payers. It was also alleged, that A, made one of the defendants, as owner of one of the judgments, colluded with the officers of the district in issuing the fraudulent order upon which his judgment was founded, and that he had due notice, when he recovered his judgment, of all the grounds of avoiding it. Held, as to him, the complaint stated a cause of action.⁵ So, in the important case of *Mott v. The Pennsylvania Railroad*,⁶ the remedy of injunction was sustained, to enforce the constitutional principle, that the legislature has no power to alienate any of the rights of sovereignty, such as that of taxation, so as to bind future legislatures; and to avoid a contract made in pursuance of such a legislative act. The specific ground of equitable interposition, was an act of the legislature

¹ *Baltimore v. Porter*, 18 Md. 284.

² *Lyon v. Hunt*, 11 Ala. 285.

³ *Com. v. Supervisors, &c.*, 29 Penn.

⁴ *Miller v. Gorman*, 38 Penn. 309.

⁵ *Newcomb v. Horton*, 18 Wis. 566.

⁶ 30 Penn. 9.

by which the defendants, in case they should purchase the *Main Line of Public Improvements*, should be thereafter exempted from all except certain enumerated kinds of taxes. On the other hand the State of Ohio, by an act incorporating the Ohio University, vested in it two townships of land for the purposes of the institution, and authorized the University to lease the lands, providing also that they should be forever exempt from taxation. The lands having been leased, a subsequent act was passed, imposing a tax upon them, and such tax was about to be levied. Held, the tax was contrary to the constitutional provision against the violation of contracts; and, to prevent a multiplicity of suits, the plaintiff might for himself and other lessees maintain a bill for an injunction against the treasurer of the county.¹ So a person owning real estate in the city of New York, and paying taxes on it, may by action against the corporation, on behalf of himself and other tax-paying citizens, enjoin them from expending the money to be raised by taxation, in repairing or paving a street in a manner contrary to an express law, and to add to the taxes of the citizens.² So a tax-payer, affected by the illegal payment of claims against the county, may obtain an injunction to restrain the making of such payment.³ So, in *Tash v. Adams*,⁴ an injunction was granted on the application of twenty-four tax-payers, to restrain a town treasurer from paying out money in pursuance of a vote to celebrate the surrender of Cornwallis. More especially as the application was made immediately after the vote was passed and before any money was expended, and as the money actually raised and expended for the celebration was furnished by subscription, upon condition that it should be refunded by the town, if the court should sanction its being drawn from the treasury.

§ 1 b. In *Burnet v. Cincinnati* (3 Ohio, 88), it was remarked by the court, that, unless equity might thus interpose, "public officers, having authority to operate upon the property of their fellow citizens, must be permitted to proceed, however illegal, unjust or oppressive their conduct may be. It follows, too,

¹ *Matthey v. Golden*, 5 Ohio St. 361.

² *De Baun v. The Mayor*, 16 Barb.

392.

³ *Foster v. Coleman*, 10 Cal. 278.

⁴ 10 Cush. 253.

that the property of a citizen may be exposed to sale under circumstances that render it impossible for the parties to know whether a title can pass or not. — Chancery may interpose by injunction, to prevent what is considered as destruction. But destruction in the sense used, does not mean annihilation. It means no more than that injury which greatly impairs its intrinsic value. In a city, the sale of part of a lot for assessments, may often be very destructive — though no title passed. — A cloud would be cast upon the title, which litigation only could remove. — Consequences — in respect to the collection of revenue, furnish no reason why the court should not interpose.”

§ 1 c. A bill was filed by a single stockholder of a bank, to restrain by injunction a tax-collector in Ohio from the collection of a tax, on the ground that the law imposing it was unconstitutional and void. The Circuit Court of the United States granted the injunction, and the Supreme Court affirmed the order.¹ (Three judges dissenting.)

§ 2. But on the other hand it is held, that courts of equity ought not, except upon the clearest grounds, to interfere with the speedy collection of public taxes.² (a) That a writ of injunction can only be issued, where the complaint makes out a case of equity jurisdiction; and, in all cases involving simply the question of taxation, the issue is strictly one of common law, and courts of equity can take no cognizance thereof.³ That a party aggrieved by an illegal taxation has ample remedy at law, and need not in any case have recourse to a court of equity; and a court of equity has no authority to restrain by injunction the collection of such illegal tax.⁴ And that the unlawful collecting of a tax is a mere trespass, not to be enjoined, without allegation and proof of irreparable injury therefrom.⁵ So, in Missouri, the Supreme Court will not inter-

¹ Dodge v. Woolsey, 18 How. 321.

² 25 Conn. 232. See Messeck v. Board, &c., 50 Barb. ; Am. Law Reg., August, 1868, p. 637.

³ Minturn v. Hays, 2 Cal. 590.

⁴ Wilson v. Mayor, &c., 4 E. D. Smith, 675. See Robinson v. Gaar, 6 Cal. 273.

⁵ Ritter v. Patch, 12 Cal. 298; Berri v. Patch, Ib. 299; Ins. Co. v. New York, 33 Barb. 322.

(a) The collection of a tax cannot be enjoined in an action *at law*. Spencer v. Wheaton, 14 Iowa, 38.

tere by injunction, to prevent a sale of personal property for non-payment of taxes.¹ Nor to restrain a collector from selling the plaintiff's property to satisfy a school tax assessed by the proper school district.² Nor, where land was sold for taxes, and purchased by the city of St. Louis, and the city afterwards proposed to sell it, to restrain such sale on application of the original owners, on the ground that the original sale was irregular and void.³ Nor to restrain the collection of a tax, on the ground that the rate of taxation is greater than it would have been, had not property liable to be taxed been improperly omitted from the valuation; this fact not rendering the tax wholly void.⁴ More especially, equity will not enjoin a tax for mere errors, if the levy of it is attempted by an officer *de facto* under authority incident to his office; though it is otherwise, in case of levy by one without pretence of authority, or color of office to which such right is incident.⁵ Thus equity will not restrain the collection of a school tax, levied by officers *de jure* or *de facto*, on account of irregularities in their levy or collection.⁶ Nor for irregularities in the assessment.⁷ So it has been held that equity cannot enjoin the collection of a tax assessed in the ordinary way, and unaccompanied by circumstances of peculiar injury, even if the law authorizing the tax be unconstitutional.⁸ And, in a late case, an application to enjoin an unconstitutional assessment was refused, the court, as now advised, seeing no ground on which such assessment conflicts with the Constitution.⁹ So an injunction cannot be had to restrain the collection of a tax, upon the ground that the party has paid a previous illegal tax.¹⁰ So the Supreme Court of New York has no jurisdiction to restrain, by injunction, the collection of taxes, on the ground that the returns are insufficient and show no authority for the issuing of the warrants of collection.¹¹ And, as already stated, the adequacy of the remedy at law is always held to be ground for denying an

¹ Lockwood v. St. Louis, 24 Mis. 20.

² Sayre v. Tompkins, 23 Mis. 443.

³ City, &c. v. Goode, 21 Mis. 216.

⁴ Exchange, &c. v. Hines, 3 Ohio (N. S.), 1.

⁵ Munson v. Minor, 22 Ill. 594.

⁶ Merritt v. Farris, 22 Ill. 303.

⁷ Chicago, &c. v. Frary, 22 Ill. 34; McBride v. Chicago, Ib. 574.

⁸ McCoy v. Chillicothe, 3 Ham. 380.

⁹ Thompson v. The Treasurer, &c., 11 Ohio St. 678.

¹⁰ Fremont v. Mariposa, 11 Cal. 361.

¹¹ Van Rensselaer v. Kidd, 4 Barb. 17; Livingston v. Hollenbeck, 4 Barb. 9.

injunction. As, to restrain a city corporation from enforcing assessment warrants against personal estate, for the expenses of a public improvement, although the assessment and warrant may be illegal and void.¹ In this case it was remarked, "There are reasons of policy, founded on the necessity of speedy collection of taxes, which ought to prevent a court of chancery from suspending these proceedings, except upon the clearest grounds."² And it is said in a later case, "We will not" (stay the collection of an illegal town or city tax) "as against a single tax-payer, upon the mere ground that it is illegally assessed upon him, without special equities, and when the law affords a far better and more appropriate remedy, in view of his rights and necessities and those of the public, than any which we can administer."³ So where the common council of a city have authority by law to make an assessment, chancery will not restrain the collection of such assessment, under a warrant against the goods and chattels of the complainant, but will leave him to his remedy at law.⁴ Nor a *distrain* by a treasurer, against the money and property of an incorporated bank, upon the ground that the act imposing the tax is unconstitutional. If so, the treasurer is a trespasser, and is liable at law.⁵ Nor, in Rhode Island, the collection of a general, or of a sidewalk tax, of a town or city, on the mere ground that it has been improperly assessed against the complainant, and that his real estate has been levied upon, and is about to be sold for its satisfaction; the remedy at law being sufficiently adequate, and far more consonant with the scope and provisions of the tax act.⁶ More especially, equity will not interfere, if there is a statutory remedy.⁷ As, to enjoin a city from collecting a tax imposed by its street commissioners, for widening a street, the acts of Assembly and ordinances of the city having given the right of appeal to the city court, which remedy the complainants failed to take.⁸ And although the court will, by injunction, restrain the imposition of any illegal tax or burden on the tax-payers of a city, upon the

¹ *Dodd v. Hartford*, 25 Conn. 232.

² Per Seymour, J., 25 Conn. 239.

³ Per Ames, C. J., *Greene v. Mumford*, 5 R. I. 478.

⁴ *Williams v. Detroit*, 2 Mich. 560.

⁵ *Mechanics', &c. v. Debolt*, 1 Ohio, 591.

⁶ *Greene v. Mumford; Simmons v. Same*, 5 R. I. 472.

⁷ *Hughes v. Kline*, 30 Penn. 227.

⁸ *Methodist, &c. v. The Mayor, &c.*, 2 Md. Ch. Decis. 78.

complaint of any tax-payer, who complains both in his own behalf and in behalf of those who are similarly interested with himself, or on the complaint of any corporator of the city having an interest in the corporate property, such complaint showing an illegal application of any part of the corporate property; yet, in such case, in order to a complete determination of all the rights affected by the suit, the plaintiff must aver that he files his complaint as well in behalf of those similarly interested, as in his own.¹ So where a bill in equity was brought by the owner of lots, situated on the plank-road of an incorporated company, to restrain the city government from collecting an assessment for paving the road; held, the company not being a party, the court would not consider whether its rights were infringed, and the complainant alone had no case.²

§ 3. And later cases are opposed to the interference of courts of equity by injunction with the assessment or collection of taxes except in very special cases. It is held that the collection of a tax shall not be enjoined, except where it is illegal, or upon property not taxable, and upon the ground of serious or irreparable injury, or multiplicity of suits.³ Or, though illegal, unless the case comes under some acknowledged head of equity jurisdiction.⁴ Or the imposition of a tax on land, on the ground that it constitutes a lien and cloud upon the title, unless a multiplicity of suits will be thereby prevented.⁵ The remedy is termed "summary, peculiar, and extraordinary," and discretionary.⁶ Upon these grounds, an inhabitant of a town was refused an injunction against payment of an award for injury on a highway, — as increasing his tax.⁷ So where lands were misdescribed in the assessment

¹ *Wood v. Draper*, 24 Barb. 187. *

² *Bagg v. Detroit*, 5 Mich. 336.

³ *County, &c. v. Chicago, &c.*, 35 Ill. 460; 33 Conn. 497; *Ins. Co. v. N. Y.*, 33 Barb. 322; *Connelly v. Parkville, &c.*, 32 Mis. 496.

⁴ *Susquehanna, &c. v. Supervisors*, 25 N. Y. (11 Smith) 312.

⁵ *Oakley v. Pound*, 1 M'Cart. 178.

⁶ 33 Conn. 497.

⁷ *Hine v. Stephens*, 33 Conn. 497.

* This case is said by Davies, J., to have been "argued with an ability commensurate with its importance, and with the high standing at the bar of the distinguished counsel (seven in number) employed in the cause."

The case goes into an extended and elaborate view of previous decisions, more particularly in the State of New York.

through mistake of the party.¹ Or if the tax is no more than is just.² Or, to restrain a tax-deed, if a part of the tax was legal, and the party has not offered to pay this part. Or if the irregularity rather diminished than increased the plaintiff's tax.³ So if one excessively taxed omit the course provided by law for his relief, the court will not enjoin the collector, for the purpose of enabling him to bring an action to settle the legality of the tax.⁴ And, in case of a tax on personal estate, it is held that the party has an ample legal remedy by action against the municipal corporation to which the money is paid, or for which it is collected.⁵ So an injunction does not lie against the collection of a tax, if the city council are authorized by the charter "to correct or equalize any erroneous or injudicious assessment."⁶ So an injunction will not be granted against levying a tax, upon the ground that the action of the court was a nullity for want of jurisdiction.⁷ Nor against a city assessment, on the ground of illegality, where it would be very injurious to the defendants, and of little benefit to any other party.⁸ And, in a very late case in Massachusetts, the interference of equity with the assessment of a tax was distinctly disclaimed; the mere assessment being no injury, and for the collection, if unlawful, there being a perfect remedy at law. The court remark: "We can see no ground on which a single tax-payer who has been illegally assessed can ask for the interference of a court of equity."⁹

§ 4. Thus the purchaser at a tax-sale under (Wis.) laws of 1854, c. 66, or under laws of 1859, c. 22, was entitled to a deed at the end of three years from the sale in all cases where the land remained unredeemed at that time; although the lands of minors, married women, &c., were subject to redemption after the delivery of the deed. And an action against the grantee in a tax-deed executed under either of said stat-

¹ Hubbard v. Henison, 15 Mich. 146.

² Dean v. Gleason, 16 Wis. 1.

³ Bond v. Kenosha, 17 Wis. 284; Mills v. Gleason, 11 Wis. 470.

⁴ Deane v. Todd, 22 Mis. 90.

⁵ Van Cott v. Milwaukee, &c., 18 Wis. 247; Mutual, &c. v. Supervisors, 8 Bosw. 683.

⁶ Macklot v. Davenport, 17 Iowa, 379.

⁷ Connelly v. Parkville, &c., 32 Mis. 496.

⁸ Jones v. Newark, 3 Stockt. 452.

⁹ Per Bigelow, C. J., Brewer & Springfield, 97 Mass. (1 Browne) 154.

utes, to restrain him from entering upon the land, cutting timber, &c., cannot be maintained by the original owner, though still entitled to redeem, unless he has redeemed in fact or offers to do so.¹ So an injunction, to restrain the city of Atchison from selling certain lots for non-payment of an illegal tax, will not be granted, the remedy at law being clear and undoubted.² So, the school directors of a township having assessed a school tax of eleven mills, eight for school purposes and three for building new schools, a property-holder filed a bill for an injunction to restrain the collector from enforcing the tax, on the ground that it was greatly in excess of what was necessary, but not alleging any irregularity, neglect of duty, or excess of authority in the directors. Held, as the bill averred only an indiscreet exercise of a clearly granted discretion, that bill could not be sustained.³

§ 5. In the case of *Ottawa v. Walker* (21 Ill. 610), Mr. Justice Walker makes the following distinction, which may perhaps tend to reconcile some of the discordant decisions upon the subject now under consideration. "Where a corporation, or an officer, or a body of individuals are vested with the power to levy a tax for a specific purpose, a court of equity will not inquire into the regularity of the exercise of the power, but leave the parties to their remedy at law, unless it is exercised for fraudulent purposes. But when the law has conferred no power to levy a tax, or in case a person or an officer not authorized by law to exercise such a power, shall levy a tax, or when the proper persons shall make the levy for purposes on the face of the levy, not authorized, or for fraudulent purposes, a court of equity may stay its collection by injunction."

§ 6. In other cases, the following distinctions are made.

§ 7. Equity will not interpose, to declare void a sale for taxes, and to restrain the execution of a deed, on the ground of irregularity, when it appears that the owner of the land

¹ *Wright v. Wing*, 18 Wis. 45.

² *Burnes v. Atchison*, 2 Kans. 454.

³ *Wharton v. School Directors*, 42 Penn. 358.

has suffered no injustice, but has even been benefited, by such irregularity. But where the established principle of taxation has been violated, and actual injustice will ensue; or the tax is levied for an unauthorized purpose: equity will in proper cases interfere.¹

§ 8. Equity will not enjoin a tax before levy, and only to protect the plaintiff; and one individual cannot, in this mode, protect the public. But equity may thus interpose, where there are numerous individual interests arising from the same injury.²

§ 9. The charter of a city declared, that, on or before the 1st of July in each year, the assessors should return their assessment-roll to the common council, by depositing the same with the clerk; that, when the roll should have been revised and corrected by the council, it should be filed with the clerk, and the order approving it entered in the proceedings of the council; and that, on the first Monday of July in each year, or within ten days thereafter, the council should determine the amounts of taxes to be levied for general city purposes, &c., and should, by resolution, levy the same. In an action to restrain the execution of deeds for lands sold for taxes of 1858, it appeared that the council, through inadvertence, did not determine the amounts and levy the taxes for that year until the 26th of July, and that the assessment-roll was not filed and corrected until August following. Held, that these irregularities would not avoid the tax, even at law; and still less would they entitle the plaintiff to relief in equity. The case was distinguished from cases under statutes, requiring the assessment-rolls to be lodged with the clerk before complaints could be heard and mistakes corrected. The charter in this case provided for such redress by the board of assessors before the roll was to be deposited with the clerk, and it was not claimed that the plaintiff was deprived of the remedy. It was alleged, that, between the return of the delinquent list and the sale, large sums were unlawfully added to the amounts

¹ *Warden v. Supervisors*, 14 Wis. 618; ² *Miller v. Grandy*, 13 Mich. 540.
Kellogg v. Oshkosh, Ib. 623.

charged against the several lots, and that they were included in the amounts for which the lots were sold and the certificates given. Held, if the allegation had been sustained, the plaintiff would have been entitled to restrain the execution of deeds, in case the sums so added could not be ascertained and distinguished from others.¹

§ 10. A late case involved the effect of an injunction upon an appropriation of money by a town, claimed to be invalid, but ratified by an act of the legislature.

§ 11. In August, 1863, a town voted to appropriate money to soldiers who should be drafted. An injunction was ordered upon the town and its officers. In September a similar appropriation was made and a committee appointed to expend it. All but one of this committee, who did not accept, gave an order to B, who was drafted, and, his commutation being paid, he assigned the order to the plaintiff. In August, 1864, the town ratified the doings of September, 1863, pursuant to an act of the legislature, authorizing such ratification. The injunction was continued, and in December, 1864, with the collusive assent of the selectmen, perpetuated. Held, the ratification was valid notwithstanding the injunction; the order valid; and the injunction no defence to a suit upon it.²

¹ *Mills v. Johnson*, 17 Wis. 598.

See *Bartholomew v. Harwinton*, 33

² *Waldo v. Portland*, 33 Conn. 363. Conn. 408.

CHAPTER XXV.

CONSTITUTIONAL OR STATUTORY PRIVILEGE—COPYRIGHTS; PATENTS; TRADE-MARKS, ETC.

1. Constitutional right.
- 1 a. Statutory right.
2. Copyrights and patents.
5. Copyrights.
17. Manuscripts.
20. False advertisement.
21. Patents.
40. Trade-marks.
51. Other privileges.

§ 1. A CONSTITUTIONAL privilege may be protected by injunction. (See *Corporation, Franchise, Bridge.*) Thus, where a county is established by the legislature, in violation of the Constitution, although a writ of *quo warranto* is proper, equity will interfere, by injunction, to stop an organization of the county, on the principle of *quia timet*, to prevent great and irreparable injury; and any person aggrieved may apply for the remedy.¹ So, while Congress has power to regulate commerce between States, and must prescribe rules before the courts can act; the courts may interfere to prevent irreparable injury to individuals or to the United States by an obstruction to commerce.²

§ 1 a. An injunction will be granted, to secure to a party the enjoyment of a statute privilege, (*a*) of which he is in

¹ *Bradley v. Commissioners*, 2 Hump. 428.

² *United States v. Railroad, &c.*, 6 McLean, 517.

(*a*) Statutory *prohibitions* may also be enforced by injunction. Thus, where a judgment upon a gaming contract is void, by statute, equity will relieve against such judgment, though the defence might have been made at law. *Lucas v. Waul*, 12 S. & M. 157. So although a note has been assigned to a *bonâ fide* holder for valuable consideration, without notice. *Ib.* So where a note given for

actual possession, when the legal title is settled.¹ Or against adverse claims, until their validity has been settled by a trial at law.² It is said, "the equity jurisdiction in such a case is extremely benign and salutary. Without it, the party would be exposed to constant and ruinous litigation, as well as to have his right excessively impaired by frauds and evasion. If such a contrivance as this case presents is to be tolerated, all our statute privileges of the like kind, on which millions have been expended, would be rendered of little value, and the moneys have been laid out in vain."³ Thus, upon a bill by the plaintiff, as lessee of a piece of ground, against the trustees of a turnpike, to stay them from digging gravel; it appeared that the ground in question, three acres and a half, had been added by the plaintiff, a gardener, to seven acres occupied by him as such. Held, the exception of gardens in the turnpike act, under which the defendants justified, was not restricted to gardens annexed to houses, but applied to all fields planted with garden stuff; and an injunction was ordered.⁴ So, the plaintiffs, master and wardens of the port of New York, being a corporation established by a law of the State, with a clerk and a common seal, and the members State officers, with duties specifically laid down and fees fixed; the defendants, an association of persons, claiming to be appointed by the chamber of commerce and board of underwriters, advertised to perform duties nearly similar to those created by the act of incorporation. Held, on application for an injunction, the grant to the wardens was in the nature of a franchise, and no other persons than members of their corporation had any right to perform their duties; that the grant of compensation carries with it an exclusive right to perform the services which earn them; and the defendants were enjoined, although there was a remedy at law.⁵ So where a bill has been filed, on relation of the attorney-general, for an injunction against the State

¹ *Croton, &c. v. Ryder*, 1 John. Ch. 611.

² *Livingston v. Van Ingen*, 9 John. 507.

³ *Croton, &c. v. Ryder*, 1 John. Ch. 615.

⁴ *Hughes v. Brand*, 1 Ambl. 105.

⁵ *Tyack v. Bromley*, 4 Edw. Ch. 258.

a bet upon a horse-race is absolutely void; a judgment on such note is also void, and will be so declared by a court of equity, on application of the defendant. *Martin v. Terrell*, 12 S. & M. 571.

treasurer, to prevent his paying out money under a statute, as unconstitutional; a denial of the injunction should not also decree payment of the money according to the act.¹

§ 1 b. The (Penn.) act of April 8th, 1846, forbidding any court of equity in Philadelphia from granting or continuing injunctions against the erection or use of any public works of any kind, erected or in progress of erection, under the authority of an act of the legislature, until the question of damages shall be decided by a common law court; applies to the laying out and construction of a public park, and also to works "erected or in progress," not at the date of the enactment, but at the time of the resort to a court of equity. Hence the claimant of a right of way, over land regularly appropriated by the city for a public park, is not entitled to an injunction against the city, where he has not instituted proceedings at law.²

§ 2. By the Constitution of the United States, Congress is empowered to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their writings and discoveries. And, by successive acts of Congress, the power of issuing injunctions in this class of cases is expressly vested in the courts of the United States. "Under the foregoing constitutional and legislative provisions, it has been held by the Court of Appeals of the State of New York, that the jurisdiction in the case of infringements of patents is exclusively in the courts of the United States. The reasoning of the learned judge in the case of *Dudley v. Mayhew*, tends to show that the jurisdiction, with respect to literary works and mechanical inventions, stands upon the same ground. It is believed that the jurisdiction to restrain by injunction the infringement of a patent, or the invasion of a copyright, is exclusive in the courts of the United States."³ (a)

¹ *People v. Pacheco*, 27 Cal. 175.

² *Wolbert v. Philadelphia*, 48 Penn. 439.

³ U. S. Const., art. 1, § 8; 6 Laws

U. S. 369; U. S. Laws, 1836, 242, § 17; Brightly's U. S. Dig. 193 n. i., 732 n. i.; *Dudley v. Mayhew*, 3 Comst.

9; Wil. Eq. Juris. 384-5.

(a) A contrary doctrine was held by a majority of the court, in *Woolsey v. Judd*, 4 Duer, 379.

§ 3. An early English case seems to justify this close connection between the two rights of patent and copyright.

§ 4. Bill to restrain the printing of Bibles, the plaintiffs claiming as king's printers, under several *patents* continued down by mesne assignments. In the eighth year of Charles I. such patent was granted to the University of Oxford, and afterwards confirmed. It was observed, that the Bible was translated at the king's own charge, and that printing was brought in by Henry VI. at his own charge. The Lord Keeper was of opinion that it was never meant by the patent to the University, that they should engross the printing, and prevent the king's farmers of the benefit of their patent; but ordered an action and trial at law, the defendants to admit the printing a competent number of Bibles, and refused an intermediate injunction.¹

§ 5. Copyrights are a frequent subject of equity jurisdiction and of injunction. (a) As showing the necessity for the remedy of injunction in the case of copyrights, Judge Story remarks: "The sale of copies by the defendant is not only, in each instance, taking from the author the profit upon the individual book, which he might otherwise have sold; but it may also be injuring him, to an incalculable extent, in regard to the value and disposition of his copyright, which no inquiry for the purpose of damages could fully ascertain. In addition to this consideration, the plaintiff could at law have no preventive remedy, which should restrain the future use of

¹ Hills v. University, &c., 1 Vern. 275.

(a) Milton's "Paradise Lost" was the subject of four injunctions. Tonson v. Walker, 3 Swanst. 673. A well-known religious work, "The Whole Duty of Man," was protected in the same way. Eyre v. Walker, 4 Burr. 2325; 3 Swanst. 673.

An author, as well as publisher, may be restrained by injunction. Thus, where an author sold his copyright, and covenanted not to publish any other work to the prejudice of the one sold; he was restrained from such publication by injunction. Barfield v. Nicholson, 2 Sim. & St. 1.

In a very late case the question of violation of copyright is said to depend upon the injurious *result* of the publication complained of, notwithstanding full acknowledgment of the former work, and the absence of any dishonest purpose. Scott v. Stanford, Law Rep. (Eng.) Eq., May, 1867, p. 718.

his invention or the future publication of his work. Besides, the bill usually seeks an account, in one case of the books printed, and in the other of the profits which have arisen from the use of the invention.”¹ (a)

§ 6. It is said: “Formerly courts of equity would not interfere, by way of injunction, to protect copyrights, until the title had been established at law. But the present course is, to exercise jurisdiction in all cases, where there is a clear color of title, founded upon a long possession and assertion of right.”² Though an injunction *pendente lite* should not be granted on light grounds, nor in doubtful cases, but should await the full proof upon the final hearing.³

§ 6 a. The plaintiff, being clerk and registrar of the London coal market, and having charge of the books, was accustomed to publish, under authority of the company, at a considerable profit to himself, statistical returns, extracted from the books, of all coal imported into the city; publishing them annually in sheets, and supplying them to subscribers at £3 3s. per annum. The defendant published a work, under authority of the Lords of the Treasury, giving the mineral statistics of

¹ 2 Story's Eq. 246, §§ 932-3; *Pierpont v. Fowle*, 2 W. & M. 23.

² 2 Story's Eq. 248, § 935.

³ *Redfield v. Middleton*, 7 Bosw. 649.

(a) But a leading case of high authority points out the following limitations of equity jurisdiction, and distinctions between English and American practice. An injunction, as a preventive remedy, is more ample and appropriate than a suit at law; and hence, when it is asked, and an account and disclosure of facts desired, they will be required, in order to settle the question in controversy. But equity cannot relieve on the ground of a right which the party has failed to redress at law; but proper matters for the exercise of its jurisdiction must be set out and sustained. *Stevens v. Gladding*, 17 How. 447; *Stevens v. Cady*, 2 Curt. 200. If no benefit appears to be gained by proceedings in equity rather than at law; the bill will be dismissed without prejudice, in order that proceedings may be had at law. In England, where the powers of law and equity are concurrent, equity may in its discretion proceed to act; but in the Circuit Court of the United States it is otherwise, under the judiciary act of 1789, if the remedy at law and in chancery is equally full and perfect; and the objection may sometimes be taken under the answer, and at the hearing, as well as by demurrer. But where the title to the copyright under a contract of sale is also in dispute; this question may be settled in equity, in preference to sending the parties to the law side of the court. *Ib.*

the United Kingdom for preceding years, and costing 2s. 6d. ; into the edition of which work for 1866 he incorporated the plaintiff's returns for the last nine years, with a prominent acknowledgment of this source of information. These returns formed one third of the entire work. Held, a case for injunction.¹

§ 7. An injunction was granted to protect a copyright in an East Indian calendar or directory, it appearing that the work complained of was a mere copy with colorable variations. Lord Chancellor Erskine, in answer to the argument that the work in question was not in its nature a proper subject of copyright, remarked: "In the case of Dr. Trusler's Chronology all the remarkable events, the accounts of eminent persons, every matter of curiosity and interest, were subjects of information past and gone by, which could not be altered. All human events are equally open to all. Dr. Trusler finally had the decision in his favor. The next is the case of a map. How is it possible to have a copyright in a map of the Island of St. Domingo? Must not the mountains have the same position, the rivers the same course? The answer was, that the subject of the plaintiff's claim was a map, made at great expense, from actual surveys. The defendant's map was a servile imitation. In the case of the chart of the English Channel, must not the latitude and longitude of the several points upon the adjoining shores and the soundings, be the same as they were placed by nature? They must be the same, or the chart must destroy the mariner. What room, then, can there be for originality? That may be a reason for not making a new chart, but it is no reason for a servile imitation. In the case of Patterson's Road-Book, the very errors were copied. The charts representing twenty-five fathoms water, where there was dry land, would have wrecked the mariner. In the Road-Book, where Mr. Justice Grose's beautiful seat, the Priory, is noticed, an error in printing his name was exactly copied."²

¹ Scott v. Stanford, Law Rep. (Eng.) Eq., May, 1867, p. 718.

² Matthewson v. Stockdale, 12 Ves. 270, 272.

§ 8. In another leading case upon this subject, the plaintiff had a copyright for six short poems and parts of longer ones, included in a work of the defendant's, which contained an original essay on modern English poetry, biographical sketches of a large number of modern poets, and selections from their poems. The bulk of the defendant's work consisted of the selections, but they were alleged to have been inserted for the purpose of illustrating the essay. Held, the plaintiff was entitled to an injunction.¹

§ 9. But, in *Osborne v. Donaldson*,² Lord Chancellor Henley declined granting an injunction founded upon copyright *at common law*, remarking "that it was a point of so much difficulty and consequence that he should send it to law for the opinion of the judges." So, in *Baskett v. Cunningham*,³ being a bill brought by the king's printer to restrain the publication of a digest of the statutes, it appeared that the defendant had contracted with Strahan & Woodfall, proprietors of the patent for printing law books, and the work was printed at their press. The answer disclaimed all property in the work. A general injunction was refused, Lord Chancellor Henley remarking: "I am of opinion that this work is entirely within the patent of the king's printer, and that these notes are merely collusive. But I shall not interfere, but leave them to adjust their rights in a due course of law. The injunction must therefore be to restrain the proprietors from printing at any other than a patent press."⁴ And in trifling cases an injunction has been denied. Thus, in a periodical work of theatrical criticism, the defendant inserted a few pages of scattering passages from a farce of the plaintiff, forty pages in length. The profits did not amount to £3. Held, a bill for injunction should be dismissed.⁵ So an injunction was refused against the copying of tables of calculations, which could be cast anew for less than £8, and in a short time.⁶

¹ *Campbell v. Scott*, 11 Sim. 31.

² 2 Ed. 327.

³ 2 Ib. 137.

⁴ *Baskett v. Cunningham*, 2 Ed. 137-8.

⁵ *Whittingham v. Wooller*, 2 Swanst. 428.

⁶ *Baily v. Taylor*, 1 Russ. & My. 73.

§ 9 a. In 1863, A registered a proposed new magazine, to be called *Belgravia*. In 1866, the magazine not having appeared, B, without notice, projected another, of the same name, and incurred considerable expense in preparing it, and extensively advertising it in August and September, as about to appear in October. A, knowing this, hastily prepared to publish his own magazine before the other, and in the mean time accepted an order from B for advertising B's magazine on the covers of his own publications, and first informed B, that he objected to his work, on the 25th of September, the day of publication of A's first number. B's magazine appeared in October. Upon a bill filed by B to restrain A's publication, held, B's advertisements and expenditure did not give him any exclusive right to the name; and an injunction was refused. Also, on a bill filed by A, to restrain B from using the name, as A's trade-mark; that the registering of the title gave A no copyright in the name, and this injunction was also refused. Sir G. J. Turner remarks: "This case being — altogether new, must be considered upon principle. — The plaintiff must show some property — in the subject-matter. — That expenditure upon a work not given to the world, can create, as against the world, an exclusive right to carry on a work of this nature, seems to me a proposition quite incapable of being maintained. — An advertisement is nothing more than an announcement of an intention — to publish — a work under a given title. — He does not by his advertisements come under any obligation to the public to publish the work. — When we are dealing with a question so entirely new — we cannot dispose of the case without considering the conveniences and inconveniences. — What amount of expenditure, and what degree of publicity, will be sufficient. — In the case of advertisement followed by publication, the party publishing has given something to the world, and there is some consideration for the world's giving him a right. — There is a total want of consideration." Sir H. M. Cairns, L. J., says: "The court has no means of judging — upon a question of reputation. We have no test which we can apply. — This case cannot be decided on the ground of the loss which may be sustained by the plaintiff. — The first question — is, is there a right, or is

there a property — to be protected. — The right of the plaintiff must stand upon his own title, and not upon any act of the defendant.” In reference to the other bill, Sir H. M. Cairns, L. J., remarks: “The plaintiffs — rest their claim upon two grounds. First, that they have a right, by way of copyright, to the word ‘Belgravia,’ as a title; and, secondly, that it has become by sale in the market of their goods, a species of trade-mark. — When was the copyright acquired? — The copyright under the act is ‘a right of printing, or otherwise multiplying copies of’ any ‘volume, part or division of a volume, &c. — separately published.’ — At the time of making the entry in the register — there was no volume, no part of a volume, no sheet — of any kind. — There was nothing in existence except that very entry itself, and the entry of the name of a future publication. — As regards the time of publication — could a title be acquired at that time to the word ‘Belgravia?’ I think that it could not. — There had been the use of the term — in advertisements — for two or three months. — The term — as the title of a magazine, was familiar to the public — and no copyright could be claimed. I apprehend — there cannot be what is termed copyright in a single word, although the word should be used as a fitting title for a book. The copyright — must be — in some words in the shape of a volume, or part of a volume, which is communicated to the public, by which the public are benefited, and in return for which a certain protection is given to the author. — The declaration of an intention to use at a future period the term — would not secure any protection — as a trade-mark. — Can they, who are led to this publication — from the circumstance that they knew Mr. Maxwell was projecting a similar publication similarly named, and who abstained from informing him of any right — which they intended to assert — who communicated with him — at a most critical period of his work, leading him to believe — that they would be willing to herald the publication — can they come forward — publishing a number of their own work and say, ‘now we ask the Court’ of Chancery to restrain Mr. Maxwell. Undoubtedly they cannot. — The court — would be countenancing that conduct — far removed from the kind of fair and candid dealing which

one would like to see prevailing between two commercial firms or two men of business." In both cases, the plaintiffs were ordered to pay costs.¹

§ 10. A bill in equity against three defendants made title on its face in the plaintiff to a copyright, and showed a wrongful and wilful violation of it by all the defendants, and serious injuries inflicted by, and apprehended from such violation, and prayed for an injunction against all the defendants, and for a discovery from all. On general demurrer, held, the relief by injunction was not dependent upon the discovery prayed for, but rested on the equities set forth in the bill, and might be refused or granted irrespective of the discovery, although the bill was bad as a bill of discovery.²

§ 11. Neither the bill nor affidavit need specify the parts of the work claimed to be printed, though no copyright is claimed in all the identical passages.³ But where A applied for an injunction against a stereotyper, to prevent his selling the books printed by him from advance sheets, furnished him by A, of a work written by B; held, an allegation that "the sheets were sent to him for the advantage of said B," and of himself, was too vague to be made the foundation of an injunction, on the ground of protecting B's rights.⁴

§ 12. Where the injunction is continued, subject to the plaintiff's bringing an action, the court will not allow a continuance of the sale, keeping an account, without consent of the plaintiff.⁵

§ 13. In a very late case it is held that the court will hesitate to commit a defendant alleged to have violated an *interim* injunction, if he has endeavored to set himself right with regard to the original charge against him, of infringing the plaintiff's copyright.⁶

¹ Maxwell v. Hogg, Law Rep. (Eng.) Eq., April, 1867, 305, 321.

² Atwill v. Ferrett, 2 Blatch. Cir. Ct. 39.

³ Sweet v. Mangham, 11 Sim. 51.

⁴ Redfield v. Middleton, 7 Bosw. 649.

⁵ Sweet v. Mangham, 11 Sim. 51.

⁶ Cornish v. Upton, 4 Law Times, N. S. 862.

§ 14. It is said, "No copyright can exist, consistently with principles of public policy, in any work of a clearly irreligious, immoral, libellous, or obscene description. In the case of an asserted piracy of any such work, if it be not a matter of any real doubt, whether it falls within such a predicament, or not, courts of equity will not interfere by injunction to prevent or to restrain the piracy; but will leave the party to his remedy at law."¹

§ 15. Judge Story remarks: "In some cases, a court of equity will take upon itself the task of inspection and comparison of books alleged to be a piracy. But the usual practice is, to refer the subject to a master, who then reports, whether the books differ, and in what respects; and, upon such a report, the court usually acts in making its interlocutory, as well as its final decree."² And Mr. Curtis says, on the same point: "In general, if the court sees strong ground for supposing that the defendant's work is a violation of the plaintiff's copyright, the course is to grant an injunction *ex parte*, until answer or further order. Then, in order to ascertain the fact of piracy or no piracy, it is referred to a master to examine into the originality of the new book, or the court takes upon itself the inspection of both works. Where the works are long and of a complex character, containing original matter mixed with much that is common property, they will be referred to a master; but where they are of a class affording facility for the detection of piracy by immediate inspection, the court will examine them."³

§ 15 a. A bill was brought by the plaintiff, a bookseller, for an injunction against the printing of a book entitled *Modern Crown Law*; it being alleged to be colorable only, and in fact borrowed *verbatim* from Hale's *Pleas of the Crown*, with the omission of some old and repealed statutes, and a translation of Latin and French quotations. Lord Hardwicke remarked, the act "ought to receive a liberal construction, for it is very far from being a monopoly, as it is intended to secure the prop-

¹ 2 Story's Eq. 249, § 936.

² *Ib.* 254, § 941.

³ Curtis, Copyr. 325.

erty of books in the authors themselves, or the purchasers of the copy, as some recompense for their pains and labor. — Where books are colorably shortened only, they are — a mere evasion of the statute. — But — abridgments may with great propriety be called a new book, because — the invention, learning, and judgment of the author is shown in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense. — In the present case it is merely colorable — but I shall not be able to determine this properly until both books were read over, and the case fairly stated. Mr. Attorney-General has said I may send it to law to be determined by a jury; but how can this possibly be done? It would be absurd for the chief justice to sit and hear both books read over. — The court is not under an indispensable obligation to send all facts to a jury, but may refer them to a master. — It would be much better for the parties to fix upon two persons of learning and abilities in the profession of the law, who would accurately and carefully compare them, and report their opinion. — The House of Lords, very often in matters of account which are extremely perplexed and intricate, refer it to two merchants named by the parties, to consider the case.” The case was referred to an award.¹

§ 16. “In cases of the invasion of a copyright by using the same materials in another work, of which a large proportion is original, it constitutes no objection, that an injunction will in effect stop the sale and circulation of the work, which so infringes upon the copyright.”²

§ 17. The publication of *unpublished manuscripts* has been sometimes made the subject of injunction. It is said, “At common law, an author has a right to his unpublished manuscripts, the same as to any other property he may possess.”³ So it is held, that the writing and sending of a letter does not give the receiver a right to publish it. Although he may own the paper, and have a special property in the contents; the

¹ Gyles v. Wilcox, 2 Atk. 142.

² 2 Story's Eq. 258, § 942.

³ Per McLean, J., Little v. Hall, 18 How. 170.

title to a copyright remains in the writer.¹ The author of any letter or letters, or his representatives, whether literary compositions, or familiar letters, or letters of business, possesses the exclusive right of publishing them. The receiver can only justify their publication, without consent of the writer, by a necessity of vindicating his own rights or character.² So it is said, "An injunction restraining the publication of private letters, must stand upon this foundation; that letters, whether of a private nature or upon general subjects, may be considered as the subject of literary property; and it is difficult to conceive, in the abstract, that they may not be so. A very instructive and useful work may be put into that shape, as an inviting mode of publication. In the cases referred to upon the letters of Pope, and Swift, and Lord Chesterfield, the subject derived its right to protection from its character of a literary composition; a character which did not cease, when it was put into the shape of letters."³ Thus an injunction was granted, in favor of the executors of Lord Chesterfield, against the widow and personal representative of his son, and the publisher, to restrain the publication of letters to his son.⁴ So Lord Hardwicke granted an injunction against publication of the letters of Pope, though not of those received by him.⁵ And injunctions were granted against publication of the letters of Swift and Burns.⁶ So, in *Queensbury v. Shebheare*,⁷ an injunction was granted against the printing of the manuscript of Lord Clarendon's History, a copy of which had been given by Henry, Earl of Clarendon, to the father of the defendant, but not for the purpose of publication. So the publication of the manuscript of a work on book-keeping, without consent of the author, may be enjoined, though the system is not a complete one.⁸ So an injunction was granted against the publication of letters from an old lady, under a weak attachment to a young man, there having been an agreement not to publish them, but to deliver them up for a valuable con-

¹ *Pope v. Curl*, 2 Atk. 342; *Palin v. Gathercole*, 1 Coll. (28 Eng. Cha.) 565.

² *Woolsey v. Judd*, 4 Duer, 379.

³ Per Sir Thos. Plumer, V. C., *Perceval v. Phipps*, 2 Ves. & B. 24.

⁴ *Ambl.* 737.

⁵ *Pope v. Curl*, 2 Atk. 342.

⁶ *Thompson v. Stanhope*, *Ambl.* 737; *Cadell v. Stewart*, 1 Bell, Com. 116 n.

⁷ 2 Ed. 329.

⁸ *Bartlett v. Crittenden*, 5 M'L. 32.

sideration, and a sum of money having been actually paid to the defendant.¹

§ 18. Chancery has jurisdiction to restrain the publication of private correspondence, only on the ground of property, either in the composition, where it is valuable as a literary production, or in the paper on which the letters are written ; and it will not interfere merely to prevent an injury to the feelings of the parties.² So an injunction against publishing private letters, alleged to have been obtained from an agent, to whom they were sent in confidence, was dissolved, upon the answer, denying confidence, and alleging, as the object of publication in the defendant's newspaper, not profit, but the vindication of his character from the public charge made by the plaintiff of giving false intelligence.³ Nor, in general, will equity enjoin the publication of commercial or friendly letters ; unless the publication would be a breach of trust.⁴

§ 19. It is said that property in a manuscript may be transferred or abandoned. But one who permits pupils to take copies of his manuscripts, for the purpose of instructing themselves and others, does not thereby abandon them to the public ; and the publication of them will be restrained by injunction.⁵

§ 20. An injunction lies, to restrain the proprietor of one work from so advertising it as to lead to the belief that it is another rival work ; but not an advertisement in disparagement of the latter, although this might be good ground of action, as a libel.⁶

§ 21. In reference to *patents*, (*a*) it is said : “ If no other

¹ ——— *v. Eaton*, cited in 2 Ves. & B. 22, 26. Wetmore *v. Scovell*, 3 Edw. 515 ; 2 Ves. & B. 27 ; Granard *v. Dunkin*, 1

² Wetmore *v. Scovell*, 3 Edw. Ch. Ball & B. 207 ; Gee *v. Pritchard*, 2 Swanst. 402.

³ Perceval *v. Phipps*, 2 Ves. & B. 19.

⁴ 2 Kent, 378.

⁵ Perceval *v. Phipps*, 2 Ves. & B. 19 ;

⁶ Seeley *v. Fisher*, 11 Sim. 581.

(*a*) In the late case of *Burr v. Duryee*, 1 Wall. 531 (doubtless an application for injunction, though the report does not so expressly find), in the Supreme Court of the United States, it is said (p. 532 n.), “ The whole business of mak-

remedy could be given in cases of patents and copyrights, than an action at law for damages, the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights.”¹ (a)

§ 22. On application for a preliminary injunction, the court will only inquire whether a case has been made, which, upon the settled rules of equity, demands its interference pending the litigation, in order to prevent irreparable injury. The plaintiff's right must be clear, and the court will itself examine the case, and not be governed by a verdict.² More especially, where the right to a temporary injunction does not depend upon any controverted and doubtful facts, but upon the interpretation of a writing, the court is bound to interpret it, and grant or refuse the injunction accordingly.³ So if, from the various transfers of a patent right, it is doubtful whether an action at law can be effectually brought; equity will take jurisdiction.⁴ And where sufficient possession is made out, a doubt as to the validity of the patent will not

¹ 2 Story's Eq. 245, § 931.

³ *Clum v. Brewer*, 2 Curt. 506.

² *Sickles v. Youngs*, 3 Blatch. 293.

⁴ *Bicknell v. Todd*, 5 M'L. 236.

ing hats from the disintegrating of the fur to the production of a hat body, was actually carried on and exhibited in the court room. No similar argument, perhaps, was ever made in any court of law; nor could a case be explained in a manner more satisfactory. This 'clinical' style of argument illustrated perfectly the poet's truth —

‘*Segnius irritant animos demissa per aurem
Quam quæ sunt oculis subjecta fidelibus et quæ
Ipse sibi tradit spectator.*’ ”

(a) In the case of *Bovill v. Crate*, Law Rep. (Eng.) Eq., March, 1866, p. 390, Sir W. Page Wood, V. C., makes the following remarks on the subject of patents: “Every patentee is subjected to difficulties of a very serious character in all the litigations he carries on; but it appears to me instead of filing many bills — he might take this course: After getting information of case after case of infringement, he might select that which he thought the best in order to try the question fairly, and proceed in that case to obtain his interlocutory injunction. He might write at the same time to all the others who were in *similar case*, and say to them ‘Are you willing to take this as a notice to you that the present case is to determine yours? Otherwise I shall proceed against you by way of interlocutory injunction; and if you will not object on the ground of delay, I do not mean to file bills against all of you at once. Am I to understand that you make no objection of that kind? If you do not object, I shall file a bill against only one of you.’ I do not think any court could complain of a patentee for taking the course I am suggesting.”

necessarily prevent an injunction. The court will look to the circumstances, and the comparative inconvenience or loss to be occasioned by granting or withholding it.¹ So where a court of equity, having heard a case on full proofs, is well satisfied of the originality of an invention, the regularity of the patent, and the fact of infringement; it will not send the case to a jury, prior to granting a perpetual injunction. Especially if the questions in the case, though questions of fact, are such as the court can decide upon the testimony of men of science, as well as, or better than, a jury; and where a jury trial would be long, costly, or troublesome.²

§ 23. No specified time of use is requisite. It depends on the extent as well as duration of the use or sales, the utility of the invention, the number of persons interested in questioning the right, and the completeness of acquiescence in it.³

§ 24. Where a patent had been in force for twelve years, and had been the subject of four suits against different persons, all of which terminated favorably to the patentee, and in two of which verdicts had been given in favor of the validity of the patent; it was held that, in a fifth case, the patentee was entitled to an injunction, pending the trial of the legal right, although a new fact was brought forward, tending to impeach the novelty of the invention.⁴

§ 25. The distinction is made, that, where a patent is new, the court considers the proof of the title in the patentee to be wanting, inasmuch as the public have had no opportunity of contesting its validity, and therefore refuses to interfere by injunction until the title has been established at law; but where there has been a long enjoyment and actual use under a patent, the public have had an opportunity of contesting the patent, and the fact of their not having done so successfully is at least *prima facie* evidence that the title of the patentee

¹ Sargent v. Seagrave, 2 Curt. 553.

Clum v. Brewer, Ib. 506; Woodworth v. Stone, 3 Story, 749.

² Goodyear v. Day, 2 Wall. Jr. 283.
See Washburne v. Gould, 3 Story, 122;
Githins v. Symes, 28 Eng. Law & Eq.
380; Sargent v. Larned, 2 Curt. 340;

³ Sargent v. Seagrave, 2 Curt. 553.

⁴ Newall v. Wilson, 19 Eng. Law & Eq. 156.

is good ; and the court therefore interferes, in such a case, before the right is established at law.¹

§ 26. An injunction will not be granted, to restrain the completion of a contract which has been entered into by the defendants, with the understanding, owing to the long acquiescence of the plaintiff, that only the question of compensation for the use of the plaintiff's patent was open between them ; the defendants not contesting the plaintiff's rights in the patent, or the fact of infringement.² But the defendants will be enjoined from using the patent, except for this contract, without the plaintiff's consent, and from disputing the right granted by the patent, or the plaintiff's title, nor will they be allowed to withdraw their offer to pay a certain sum for the use of the invention.³

§ 26 a. In 1858, A took out a patent in France, and, in 1861, in England, which last he assigned to C. January, 1865, in a suit against E for infringement, C obtained a decree, declaring the validity of the patent, and an injunction. February, 1866, the French court rendered a judgment of *déchéance*, declaring the French patent and all rights under it determined and void from February, 1864, for non-payment by A, from that time, of the annual prescribed duties. January, 1867, C moved the commitment of E for breach of the injunction. Held, the English, being identical with the French patent, was, by virtue of St. 15 & 16 Vict. c. 83, § 25, determined, in England, from February, 1866, but the French annulment, though in terms retrospective, did not affect the English patent until actually obtained ; that the injunction, granted in January, 1866, being coexistent with the patent, with that terminated, and E, in answer to the motion for commitment, might rely upon the legal termination of the order alleged to be violated ; and that C, as assignee of the French patent, was bound by the judgment.⁴

¹ *Caldwell v. Van Vlissingen*, 9 Eng. Law & Eq. 51.

² *Ib.*

³ *Smith v. Sharp's, &c., Co.*, 3 Blatchf. C. C. 545.

⁴ *Daw v. Eley*, Law Rep. (Eng.) Eq April, 1867, p. 496.

§ 27. Where, on an application for an injunction, it appeared, that the machine alleged to be an infringement contained the principle and substance of the plaintiff's invention, merely carrying it out further in practice than the plaintiff had done when he took out his patent; and that the form of construction of the defendant's machine was in law not even an improvement upon that of the plaintiff, because it was only the result of practical experience in the use of the plaintiff's machine: held, an injunction should be granted, and, the infringement being clear and the right to the injunction manifest, it was not to be stayed upon the defendants' (although they were pecuniarily responsible) giving security.¹

§ 28. But equity will not enjoin the equitable owner of a patent, on petition of the legal owner.² And before a patentee can have an injunction, he must show an exclusive enjoyment, long enough to justify the presumption of a right, or an incontestable right.³ Upon this subject, the following distinctions, substantially conformable to the cases already cited, are made: "Where a patent has been granted for an invention, it is not a matter of course for courts of equity to interpose by way of injunction. If the patent has been but recently granted, and its validity has not been ascertained by a trial at law, the court will not generally act upon its own notions of the validity or invalidity of the patent, and grant an immediate injunction; but it will require it to be ascertained by a trial in a court at law, if the defendant denies its validity, or puts the matter in doubt. But, if the patent has been granted for some length of time; and the patentee has put the invention into public use; and has had exclusive possession of it under his patent for a period of time, which may fairly create the just presumption of an exclusive right; the court will, in such a case, ordinarily interfere by way of preliminary injunction, pending the proceedings; reserving, of course, until the ultimate decision of the cause, its own final judgment on the merits. And an injunction will be granted not only before,

¹ *Tracy v. Torrey*, 2 Blatch. 275;
Chamberlain v. Ganson, Ib. 279 n.

² *Clum v. Brewer*, 2 Curt. 506.

³ *Thomas v. Weeks*, 2 Paine, 92.

but after the time limited for the expiration of a patent, to restrain the sale of machines, piratically manufactured in violation of the patent, while it was in force.”¹

§ 28 a. Where one of three parties runs a machine, and the other two own it; all may be enjoined.² So the directors of a company, which manufactures articles that infringe a patent, who have the management of the business, and under whose direction the articles are made and sold, and the company’s agents, are responsible for the infringement, and may be restrained by injunction.³

§ 28 b. Upon bills, to restrain infringement of a patent, against both A, the manufacturer, and B, the user of the patented article, issues of fact being found for the plaintiff, he is entitled not only to an account against A, but also damages against B, wherever the article is found. The account does not license a use of the article in the hands of all the purchasers. The patent is a continuing patent, and, while the use lasts, there is a continuing damage.⁴

§ 28 c. Where the alleged infringement of a patent occurs, and the defendant resides, in another jurisdiction; an injunction cannot be maintained.⁵

§ 29. A, owning two thirds of a patent right, filed a bill against B, to whom he had sold the other third, to compel the performance of an alleged agreement between them, by which B bound himself to discontinue the manufacturing, under the patent, when he should have made enough to reimburse him certain advances, the bill alleging that he had already made enough. The bill prayed that B might be decreed to discontinue; and an injunction restraining him from manufacturing. B, by answer, which was read as an affidavit, denied that he had yet reimbursed himself, and that he was manufacturing under the patent, and claimed, that the article he was manu-

¹ 2 Story, Eq. 246, § 934.

² Woodworth v. Edwards, 3 W. & Min. 120.

³ Goodyear v. Phelps, 3 Blatch. C. C. 91.

⁴ Penn v. Bibby, Law Rep. (Eng.) Eq., March, 1867, p. 306.

⁵ Goodyear v. Bourn, 3 Blatch. 266.

facturing was not within the patent, but a different article. The injunction was denied.¹

§ 30. The amount of damage, which will follow from restraining the use of a machine held under a patent right, is a proper consideration upon an application to suspend an injunction.²

§ 31. A bill was filed against K. to restrain him from violating the plaintiff's patent, and a provisional injunction granted, and the court afterwards allowed a supplemental bill, bringing in G. as a new party, and alleging new charges in regard to K., so as to embrace transactions not covered by the injunction, but of the same character. Held, the injunction must be extended so as to include them. It appearing that G. was the clerk of K. from the commencement of the suit, and knew of the suit and the proceedings, and on the day the argument closed became the assignee of all K.'s rights; held, on a motion for a provisional injunction against G., that he took the subject-matter assigned him with only the same rights that K. had, and did not stand before the court as an independent infringer. Held, also, that, as G. was merely a volunteer in the controversy, and intermeddled in it after the decision in K.'s case was known, he was the substitute of K., and that an injunction must issue against him.³

§ 32. Where a bond was executed by the defendant to the plaintiff, acknowledging the validity of the plaintiff's patent and his right to all that was granted by it, four months before the service of an injunction on the defendant; held, the bond was no evidence of a breach of the injunction, any further than the recital in it, that the defendant had infringed the patent, might have a tendency to establish such breach; but no inference or presumption arising from it could overcome the weight of credible, positive testimony that there was no infringement.⁴

¹ Parkhurst v. Kinsman, 2 Halst. Ch. 600.

² Barnard v. Gibson, 7 How. U. S. 650.

³ Parkhurst v. Kinsman, 2 Blatch. 78.

⁴ Byam v. Eddy, 2 Blatch. 521.

§ 33. Under the common law procedure act of 1854, § 82, the court will grant in the first instance only a rule *nisi* for an injunction; and, upon cause shown, will give such directions as would be given by a court of equity.¹

§ 34. The plaintiffs obtained an injunction against infringing the patent of a fire-engine of twenty-seven years' standing, in order that there might be a trial at law. They recovered a verdict, but upon a case stated the court were divided. Held, another action must be brought, but the court would not impose terms on the plaintiff, nor dissolve the injunction. Lord Loughborough said: "What has passed does not shake their right; but strongly supports it. The verdict, though it has failed of effect, is not to be disregarded."²

§ 35. On motion to dissolve an injunction, upon affidavits, the defendant's proof must overcome the equity of the bill and the evidence in its support.³

§ 36. Where the district judge, sitting for the Circuit Court, and being satisfied of an infringement, had granted an interlocutory injunction till trial, and the presiding judge, after hearing the testimony at such trial, differed from the district judge, who upon the same testimony adhered to his former opinion, and the jury failed to agree: held, the full court were not bound either to retain or dissolve the injunction; and they ordered that it be dissolved upon the defendant's giving security to account.⁴

§ 37. Where one of three parties runs a machine, and the other two own it, an injunction is proper against all.⁵

§ 38. If a license to use a patented machine be conditional, the conditions must be performed, in order to justify such use; and an attempt to use it will be an infringement authorizing an injunction, as there is no adequate remedy at law.⁶

¹ Gittins v. Symes, 28 Eng. Law & Eq. 380. 376; Woodworth v. Stone, 3 Story, 749.

² Boulton v. Bull, 3 Ves. Jr. 140.

⁴ Wilson v. Barnum, Wall. Jr. 347.

³ Sparkman v. Higgins, 1 Blatch. 205. See Orr v. Merrill, 1 W. & M. 120.

⁵ Woodworth v. Edwards, 3 W. & M. 120.

⁶ Brooks v. Stolley, 3 McL. 523.

§ 39. Circumstances sometimes require an *account* in connection with an injunction. Thus, on a motion for a provisional injunction, the originality of the invention was strongly denied by affidavit, and it appeared that there had been three trials at law on the question of originality, in the first of which the jury found against the patent, in the second did not agree, and in the third found in its favor. The court suspended a decision on the motion, and ordered a trial by jury, directing that in the mean time the defendant keep an account, and report monthly, under oath, to the clerk. The question of infringement was also ordered to be tried by the same jury.¹

§ 39 a. In reference to *damages*, it is said in a late case, "The inquiry will be — 'what damage the plaintiff has sustained,' and not 'what damage, if any' — as it would be in the case of a trade-mark. There is this difference between the case of a trade-mark and that of a patent: in the former case the article sold is open to the whole world to manufacture, and the only right the plaintiff seeks is that of being able to say, 'Don't sell any goods under my mark.' He may find his customers fall off in consequence of the defendant's manufacture; but it does not necessarily follow that the plaintiff can claim damages for every article manufactured by the defendant, even though it be under that mark. On the other hand, every sale without license of a patented article must be a damage to the patentee."²

§ 39 b. Where at the filing of his bill a plaintiff shows himself entitled to an injunction, the expiration of the patent pending the suit will not prevent an inquiry of damages at the hearing.³

§ 39 c. In a suit to restrain infringement of a patent, impeached for want of novelty and prior user, upon a hearing before the court, without a jury, the defendant cannot offer

¹ *Allen v. Sprague*, 1 Blatch. 567. See the *Troy, &c. v. Corning*, Ib. 467.

² Per Sir Page Wood, V. C., *Daven-*

port v. Rylands, Law Rep. (Eng.) Eq., February, 1866, p. 307.

³ *Davenport v. Rylands*, Law Rep. (Eng.) Eq., February, 1866, p. 301.

evidence of a user not stated in his particulars of objection (furnished in compliance with the St. 15 & 16 Vict. c. 83, § 41), though discovered since the particulars were delivered. The court remark: "If this witness could be allowed now, without warning to the plaintiff, to state what he saw in Belgium, some other witness might be brought to say he had bought the invention in Pekin, and the case would have to be delayed until counter evidence could be obtained from China, during all which time the patent would be running out while the defendants were under no injunction." The application is distinguished from a motion to amend the particulars, which is expressly authorized by the statute, and was allowed in the case of *Renard v. Levins-tein*, 13 M. R. 229.¹

§ 39 d. A license from the plaintiff, appearing by the answer, is sufficient ground for dissolving an injunction against the infringement of a patent.²

§ 39 e. In a suit to restrain infringement of a patent, after replication and a refusal to order issues, the court will not require of the defendant particulars of his objections to the patent. St. 15 & 16 Vict. c. 83, relates exclusively to a trial at common law, and the information sought cannot be obtained by the ordinary mode of discovery in equity.³

§ 39 f. In reference to the form of injunction, it is said in a late case, "The injunction — should — have restrained the defendants from manufacturing that which is protected by the patent — during the continuance of the patent, so long as it should be in force. — The decree, however, does not make the mistake of being drawn in a form which would amount to a perpetual injunction, and I think that that which ought to have been distinctly expressed may be reasonably derived from the form of the order."⁴

¹ *Daw v. Eley*, Law Rep. (Eng.) Eq., January, 1866, p. 36, per Sir W. Page Wood, pp. 40-1.

² *Goodyear v. Bourn*, 3 Blatch. 266.

³ *Bovill v. Goodier*, Law Rep. (Eng.) Eq., January, 1866, p. 34.

⁴ Per Sir Page Wood, V. C., *Daw v. Eley*, Law Rep. (Eng.) Eq., April, 1867, p. 507.

§ 40. Somewhat analogous to patents and copyrights, and of late even more frequently made the subject-matter of injunction, are *trade-marks*. It is said, "No man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that other person, or that he is connected with, and selling the manufacture of such other person, while he is really selling his own."¹

§ 40 a. With reference to the interference of equity in enjoining the use of an article not patented, the court in a late case remark: "Different grounds have been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence."² And in another later case it is said: "This right cannot be properly described as a copyright; it is, in fact, a right which can be said to exist only and can be tested only by its violation. Any one, who has adopted a particular mode of designating his particular manufacture, has a right to say, not that other persons shall not sell exactly the same article, better or worse, or an article looking exactly like it, but that they shall not sell it in such a way as to steal (so to call it) his trade-mark, and make purchasers believe that it is the manufacture to which that trade-mark was originally applied."³

§ 41. The general rule is, that, where a manufacturer adopts a certain trade-mark, and stamps it upon the article manufactured, he is entitled to the exclusive use of it, and a court of equity will restrain, by injunction, any other person who pirates such trade-mark from using it. It is no defence,

¹ Per Lord Langdale, *Croft v. Day*, 7 Beav. 88.

² Per Lord Cranworth, *Farina v. Silverlock*, 39 Eng. Law & Eq. 516.*

³ Per V. C., *Morrison v. Moat*, 9 Hare, 255.

* This was the case of Johann Maria Farina, the well known manufacturer of eau de Cologne. It would appear from a remark of the court, that he claimed to be "descended from a line of ancestors who for a hundred and fifty years have manufactured the article." The label in question was "Johann Maria Farina gegenüber dem Jülichs Platz."

that the simulated article is of equal value with the genuine. And an alien manufacturer may maintain a bill for such injunction against a citizen of the United States.¹ In an alleged infringement of a right to trade-marks, the court must ascertain whether the resemblances and the differences are such as naturally arise from the necessity of the case, or whether, on the other hand, the differences are simply colorable, and the resemblances such as are obviously intended to deceive the purchaser.² An injunction will be granted, if purchasers using ordinary care are liable to be misled, though not if the two trade-marks were seen side by side. So if a trader, though with some claim to the mark or name, adopt a mark by means of which the name will be made the same.³ Slight differences, which would not be perceived without strict examination, will not protect the imitation from the injunction.⁴ So a provisional injunction was granted to the assignee of a trade-mark, restraining the use of a very similar trade-mark, which was calculated to mislead the public into the belief that it was the plaintiff's, although it bore the defendant's name in very small letters.⁵ And an action to enjoin the use of a trade-mark cannot be resisted, by showing that the names used on the trade-mark are false and fictitious.⁶ The test of granting an injunction is held to be, a substantial similarity, and an intent to continue the manufacture. It may be had against an agent, represented as the proprietor, without joining the real, secret owner.⁷

§ 42. A manufacturer of steel pens put up his pens for sale in boxes of a gross each, and numbered the boxes. No. 303 denoted extra fine pointed pens, and No. 753 inferior pens, the former being sold by the manufacturer for 75 cents per gross, the latter for 18 cents. The defendant was in the practice of removing the maker's labels from the boxes containing inferior pens, and putting thereon labels made in imitation of the manufacturer's, denoting superior pens. Held, a fraud on the

¹ Taylor v. Carpenter, 11 Paige, 292.

² Taylor v. Taylor, 23 Eng. Eq. 281.

³ Seixo v. Pronexende, Law Rep. (Eng.) Eq., March, 1866, p. 191.

⁴ Williams v. Johnson, 2 Bosw. 1.

⁵ Walton v. Crowley, 3 Blatchf. C. 440.

⁶ Stewart v. Smithson, 1 Hilt. 119.

⁷ Bradley v. Norton, 33 Conn. 157.

manufacturer and on the public, and productive of damage to both, and the defendant was enjoined from continuing it.¹ So an injunction was granted in case of a trade-mark closely resembling the plaintiff's, and having attached to it a perfume manufactured by him, with the same name and style of packages; the defendant intending to counterfeit the mark, and thereby appropriate the market for the perfumery, and having been to some extent successful, and thereby injured the plaintiff.² So a manufacturer of soap, who has adopted peculiar names, marks, and labels, not before used, in order to designate his own manufacture, which serve to notify purchasers that his peculiar skill in combining the ingredients has been employed, will be protected in equity against fraudulent imitations by others. The court will grant an injunction for that purpose.³ So the plaintiff lent photographic portraits to a person who became insolvent; and, his assignees having offered the photographs for sale by auction, the defendant purchased them, and, by photographically printing from negatives, he obtained reduced copies, which he published, and sold. The plaintiff brought an action against him, and recovered nominal damages. Held, he was entitled to a writ of injunction to restrain the defendant from taking or selling any more copies, and also to recover them, or their value, under a count in detinue.⁴ So the plaintiffs, in November, 1856, "compounded, from cocoa-nut oil and other ingredients, a mixture to be used as a hair-wash, for which they devised, as a trade-mark, . . . the name or word *Cocoaine*; and they published the same very extensively, with notice that they had adopted the said name or title as their trade-mark." The defendants, in November, 1858, "commenced the preparation and sale of a similar compound, in bottles, . . . and with labels, under the name and title of *Cocoïne*." It having been found, as a question of fact, that the defendants knew of the plaintiffs' preparation, and fraudulently intended to imitate it, an injunction was granted, restraining them from manufacturing or selling any compound under the name of "*Cocoïne*."⁵

¹ *Gillot v. Kettle*, 3 Duer, 624.

⁴ *Mayall v. Higbey*, 1 Hurl. & Colt.

² *Smith v. Woodruff*, 48 Barb., Law 148.
Reg., January, 1868, p. 192.

⁵ *Burnet v. Phalon*, 9 Bosw. 192.

³ 2 Bosw. 1.

§ 43. But the right of a party to the exclusive use of a peculiar label or representation, as, for example, for a medicine which he compounds, must be clear, before he is entitled to an injunction. If the parties were jointly engaged in first getting up the medicine, in view of a contemplated copartnership; though a few other ingredients may have been added to the compound by one of the parties, he will not be entitled to an injunction restraining the other from using marks or labels similar to his, until the matter of right has been determined by an action at law, or otherwise.¹ And in a very late case the distinction is taken, that a person who has appropriated to himself a particular label, sign, or trade-mark, indicating that a certain article is made or sold by him or his authority, and with which label or trade-mark the article has become identified, is entitled to the protection of a court of equity, which will enjoin any one who attempts to pirate upon the good-will of his friends or customers by using such label, sign, or trade-mark without his authority. But there must be, between the genuine and fictitious marks, such general similarity or resemblance of form, color, symbols, designs, and such identity of words, and their arrangement, as to have a direct tendency to mislead buyers who exercise the usual amount of prudence and caution; and there must also be such a distinctive individuality in the mark employed by the counterfeiter, as to procure to him the benefit of the deception, resulting from the general resemblance between the genuine and the counterfeit labels or trade-marks.² And the court will not interfere for the protection of a trade-mark, where the plaintiff's article is noxious, dangerous, or a fraud upon the public, as in case of drugs or perfumes. Though the evidence upon the point must not be conflicting.³ So, after an injunction against the use of trade-marks, a motion to commit the defendant for a breach will not be allowed, if the plaintiff has acquiesced, and indicated a low estimation of the value of the interest in question.⁴ So a bill for injunction was held bad on demurrer, which alleged that the defendant manufactured and sold cer-

¹ Coffeen v. Brunton, 5 McLean, 256.

² Colladay v. Baird, 7 Upper Canada Law Journal, 132.

³ Smith v. Woodruff, 48 Barb., Law Reg., January, 1868, p. 192.

⁴ Rogers v. Nowill, 19 Eng. Law & Eq. 83.

tain medicine under the name of medicine manufactured by the plaintiff, but without assuming the name and character of the plaintiff. The vice-chancellor remarked: "This bill proceeds upon an erroneous notion of exclusive property now subsisting in this medicine, which Swanson, having purchased, had a right to dispose of by his will; and, as it is contended, to give the plaintiff the exclusive right of sale. If this claim of monopoly can be maintained, without any limitation of time, it is a much better right than that of a patentee; but the violation of right, with which the defendant is charged, does not fall within the cases in which the court has restrained a fraudulent attempt by one man to invade another's property; to appropriate the benefit of a valuable interest in the nature of good-will, consisting in the character of his trade or production, established by individual merit; the other representing himself to be the same person, and his trade or production the same — combining imposition on the public with injury to the individual. — The bill, stating the defendant's medicine to be spurious, asserts it not to be the same as the plaintiff's. — The defendant merely represents that he sells, not the plaintiff's medicine, but one of as good a quality."¹ So where the plaintiff's trade-mark contained the words: "Merrimack Prints. Fast Colors. Lowell, Mass.," but the defendant's was in this form: "English Free Trade. Merrimack Style. Warranted Fast Colors," and the embellishments surrounding both were similar to each other; it was held, that the resemblance was not sufficient to warrant an injunction, pending a suit at law.² So B. had acquired a reputation as a watch-maker, and all watches made by him were stamped with his name. He sold S. the right to stamp his (B.'s) name on watches made by S. S. assigned to the plaintiffs the right to stamp B.'s name on watches made by them. The defendant sold watches made by B. and stamped with his name; and a motion for an injunction to restrain him from so doing was denied.³ So a bill was filed by a trading company, incorporated by the law of Connecticut, for an in-

¹ *Canham v. Jones*, 2 Ves. & B. 218, 221.

² *Merrimack, &c. v. Garner*, 4 E. D. Smith, 387.

³ *Samuel v. Berger*, 24 Barb. 163.

junction to restrain a manufacturer of Birmingham from continuing the fraudulent use of the trade-marks of the company, and for an account of profit. The answer admitted the use, but relied on a custom, prevalent at Birmingham, for manufacturers of goods, of the kind sold by the company, to affix on the goods ordered by merchants a particular trade-mark, relying on the respectability of the merchant, when known to them, for the fact that those merchants had authority to act as agents of, or by way of license from, the person entitled to the exclusive use of the trade-marks; and alleged that the defendant had been informed, that the company themselves had ordered goods to be manufactured at Birmingham, with their own trade-mark upon them, for the purpose of sale in foreign countries. These statements were not contradicted. Ordered, that an interim injunction should be continued for a year, with liberty to the company to bring an action and proceed to trial within that time, otherwise the bill should stand dismissed with costs.¹ So, in order to procure an injunction; 1. An intent must be shown to injure the originator, by disposing of the defendant's wares as his. 2. If consisting of words, they must indicate ownership and origin, not merely quality, kind, texture, composition, utility, intended use, or class of consumers. Names having a definite and established meaning, and not indicating ownership, origin, or something equivalent, cannot be exclusively appropriated. Thus the plaintiffs, being importers of gin, were accustomed to label it "Club-house Gin." The defendants afterwards labelled their gin "Club-house, J. T. Daley," and painted, upon boxes containing it, "London club-house gin, sole importer Wm. H. Daley." "Club-house" denoted a superior quality of gin, like *imperial*, *royal*, &c. Held, the defendants should not be enjoined from their use of the word.² So, the plaintiff being a thread manufacturer of repute, the defendant bought in the market thread, wound on spools, made by others, inferior to and cheaper than the plaintiff's, and not bearing his name, but the name of a firm of thread winders who were known to be in the habit of purchasing from the plaintiff thread in the

¹ Collins Company v. Reeves, 28 L. J. Chanc. 56.

² Corwin v. Daly, 7 Bosw. 222.

hank to be wound, and selling it when wound. The defendant sold to a wholesale customer, with the assurance, alleged to have been made innocently, that the articles were made by the plaintiff, and invoiced them by certain numbers, which the plaintiff exclusively used. The purchaser attached the plaintiff's name and numbers to the spools, and retailed them as made by the plaintiff. Held, there was not such a degree of wilful misrepresentation by the defendant, as would justify an injunction; and the bill was dismissed, but without costs.¹

§ 44. Equity cannot restrain, by injunction, the use of a trade-mark, which in part consists of the name of one, with whom a part of the defendants were partners, and which was invented, adopted, and used by them in his lifetime, without objection, and has been used by them ever since. But, under (Mass.) Gen. Sts. c. 56, § 4, his executors may enjoin the use of his name in their business and firm, without his written consent, or that of his executors, and, as the statute forbids not only the assumption but the continued use of the name of another person, the injunction may be granted, though it has been used more than six years.²

§ 45. A perpetual injunction was ordered, and an account for six years, though the defendant was not aware that the mark was the property of the plaintiff or of any other person.³ But an injunction to restrain the sale of bottles, stamped with the plaintiff's name and address, followed by the words "genuine superior aerated waters," and containing soda water not manufactured by the plaintiff, was dissolved, the court being of opinion, upon the evidence, that the defendant was not shown to have used the bottles with an intention, or with the effect, of misleading the public, though the latter alone would be sufficient ground of injunction.⁴

§ 46. The plaintiffs and defendants were engaged in similar business. Fifteen months after the lease of the plaintiffs'

¹ Ainsworth v. Walmsley, Law Rep. (Eng.) Eq., April, 1866, p. 517.

² Bowman v. Floyd, 3 Allen, 76.

³ Cartier v. Carlisle, 8 Jur. N. S. 183.

⁴ Welch v. Knott, 4 Kay & J. 747.

premises had expired, the defendants procured a lease of the same works, with the exception of mines of clay, and issued a circular and card tending to give the impression that the defendants had succeeded to the business of the plaintiffs, and were working the same material which they had formerly used. Held, though the circular and card might be literally true, they might be restrained by injunction.¹

§ 47. A plaintiff and another person, who carried on distinct trades at different places of business, had derived from a common predecessor in their respective callings the right to use the name of *Dent* as a trade-mark. The defendant having infringed this right, held, the plaintiff, without averring special damage, might sue alone for an injunction, and for the delivering up of the articles so marked, to have the name erased.²

§ 48. Declaration, that A, the plaintiff, agreed with B, the defendant, to manufacture for B fire-bricks, to be marked as B should direct; that he directed that they should be marked with C's name, he well knowing that C manufactured fire-bricks thus marked to indicate that they were manufactured by him; that A, ignorant of the manufacture of fire-bricks by C, and that marking fire-bricks according to the direction of the defendant would be wrongful, manufactured fire-bricks for the defendant and marked them with the name of C; that C filed a bill for an injunction and account against the plaintiff, and that the plaintiff, in order to compromise the suit, paid C a sum of money. Held, the declaration disclosed two grounds of action: first, because the plaintiff was liable to the injunction, although he used the trade-mark of C innocently; second, because the natural consequence of the defendant's act was to involve the plaintiff in a chancery suit, even if he had the means of defending it, by reason of his having used the trade-mark of C innocently.³

¹ *Harper v. Pearson*, 3 L. T. N. S. 547. S. 673; L. J. Chanc. 495; 9 W. R. 548; 4 L. T. N. S. 637.

² *Dent v. Turpin*, *Tucker v. Turpin*, ³ *Dixon v. Fawcus*, 7 Jur. N. S. 895; 2 *Johnson & Hemming*, 139; 7 Jur. N. 30 L. J. Q. B. 137.

§ 49. Where A is ordered by B to manufacture an article and stamp it with a trade-mark not B's, that alone leads to suspicion. A, having caused the article to be manufactured, and admitting that he had casually heard of the party entitled to use such mark, must submit to a perpetual injunction, and pay costs.¹ So the defendant innocently used the plaintiff's trade-marks, and, on being served with the bill, he removed the labels, and gave an undertaking not to sell any more, but refused to pay the costs. The suit was continued to a hearing, and the account of profits, which were very trifling, was waived. Held, the defendant must pay the whole costs of suit.² So a suit was instituted to restrain the use of a trade-mark, and for an account. No application was made to the defendant before suit; and he said he would have desisted if applied to. At the hearing the account was abandoned, but a perpetual injunction was granted. Held, he must pay the costs.³

§ 50. Petition for an injunction against the use of a certain name and mark upon goods, being cutlery, alleged to be made in imitation of the celebrated cutlery of Rodgers & Company. The defendants admitted such use, but claimed that it was their true name, and a right to use it. The plaintiffs, without moving for the injunction, went into evidence in equity. At the hearing, the court, being of opinion that the right to an injunction was not established, but that the name and mark were so used as to give the false impression that the goods were manufactured by the plaintiffs, gave the defendants the option, either of a dismissal of the bill without costs, or of having a trial at law. The bill being retained for a year, with liberty to bring an action, the action was brought, and the plaintiffs recovered a verdict. Held, an injunction should be granted, with costs at law and in equity, except the costs of the evidence in equity. In the same case the court refused to require the defendants to make any admissions upon the trial at law.⁴

¹ *Collins Company v. Walker*, 7 W. R. 222; V. C. K.

² *Burgess v. Hill*, 26 Beav. 244; 5 Jur. N. S. 233; 28 L. J. Chanc. 356.

³ *Burgess v. Hatcly*, 26 Beav. 249.

⁴ *Rodgers v. Nowill*, 6 Hare, 325.

And see *Beaufort v. Morris*, 6 Hare 340.

§ 50 a. In New York, in an action to enjoin the infringement of a trade-mark, the judgment cannot direct the damages to be assessed by a sheriff's jury. The proofs must be taken by the court or a referee.¹ (a)

¹ *Guilhon v. Lindo*, 9 Bosw. 605.

(a) The following recent cases illustrate the subject of trade-marks as protected by injunction :—

New York Superior Court. Chambers, February 20. Before Justice Jones. *Henry W. Bellows v. Reeves & Tuttle*. A motion was made by Blatchford, Seward & Griswold, in behalf of the plaintiff and others of our most prominent citizens, who constitute what is known as the United States Sanitary Commission, for an injunction restraining the defendants from using the words "United States Sanitary Commission," and "U. S. Sanitary Commission," printed on envelopes, and circulating them in their business.

The plaintiffs allege that they were constituted a charitable association, by an order of the late President Lincoln, on the 9th of June, 1861, and from that time until the present they have been engaged in attending to the mental, moral, and physical welfare of the forces of the United States, so long as they were engaged in actual warfare; and since the putting down of the rebellion they have been acting in behalf of wounded soldiers, and widows and orphans of deceased soldiers, and collecting bounty money, pensions and back pay. That their services in this regard were gratuitously rendered, and that in the course of their business they have received from the government over \$10,000,000, and distributed the same among 50,000 claimants. That since its organization, the Commission has sent through the post-office large numbers of envelopes, which were printed with the words United States Sanitary Commission, and have distributed the same with circulars inclosed, calling the attention of the soldiers and their families to the capacity in which the Commission was acting, and to the manner in which it would prove a benefit to such soldiers, and are still using such name printed on envelopes.

The defendants are copartners in business at No. 78 Nassau Street, New York, and it is claimed that they have been using for a long time envelopes having printed thereon, in exact imitation of plaintiffs' envelopes, U. S. Sanitary Commission and United States Sanitary Commission, and have used the same for the purpose of distributing offensive, vulgar, and obscene circulars.

The plaintiffs claim that such use of their name is illegal, and contrary to the law in relation to trade-marks; that it tends to injure them in their business, and bring them personally into disrepute; to prevent soldiers and their families from availing themselves of the gratuitous services of the Commission in collecting money due them, and that it is a public nuisance which the court has the power to abate.

The judge, after examining the papers, granted the application.

Common Pleas (Philadelphia). *Rowley v. Houghton*. Motion for a special injunction. Opinion by Ludlow, J. The complainant in this bill has used extensively a fruit jar labelled the "Hero-ine;" the defendant now proposes to use a jar with the same label stamped upon it, but in form as follows, "The Heroine;" the complainant declares that this is a piratical use of his property, and appeals to us for protection.

§ 51. Upon the principle of trade-marks, an injunction lies against *the disclosure of secrets*, communicated to a party in the course of a confidential employment; whether secrets of

Upon the argument I inclined strongly to the opinion that the name, as about to be stamped upon the jars of defendant, was in no sense the adoption of the trade-mark of complainant, but a deliberate examination of the case has changed this view. In *Craft v. Day*, 7 Beavan, 88, the Master of the Rolls stated the following rules as tests to be applied in these cases:—

1. That there must be such a general resemblance of forms, words and symbols, as to mislead the public.

2. A sufficient distinctive individuality must be presented so as to procure for the person himself the benefit of that deception which general resemblance is calculated to produce.

All the cases seem to sustain and enforce these principles.

In the cause before us the words used on the jars are the same, "The Heroine," the only difference being in the manner in which they are stamped on the bottle.

It is not only highly probable, but reasonably certain, that the trade-mark upon the one jar will be taken for the other, for, while the name is placed in different positions on each, it is the same name, is as such well known to the trade, and the improper use of it is calculated to deceive the ordinary purchaser.

A person desiring to purchase the "Heroine" jar for fruit, will hardly stop to consider whether it is stamped thus, "The Heroine," or thus, the "Hero-ine;" and according even to the principles established in *Partridge v. Menck*, 2 Sandf. Ch. 624, to wit, that the court will not interfere when ordinary attention will enable purchasers to discriminate, and also that it must appear that the ordinary mass of purchasers, paying that attention which such persons usually do in buying the article in question, would probably be deceived, will apply in all their force.

Considering then that the use of the trade-mark by defendant does in fact interfere with the plaintiff's rights, is there anything else in this case which will require us to refuse this motion?

There is one point upon which I have had considerable difficulty: it is said that defendant was the originator of the name or trade-mark "The Heroine;" he contends that he permitted the complainant to use it after having suggested to him the name.

The affidavits establish the fact that Houghton did propose to stamp a jar with the letters "Hero-ine," and that the object was to avoid paying to the proprietor of "The Hero" jar, a certain sum as royalty. If the evidence went no further, it might be a serious question how far the court would protect the complainant in the use of a trade-mark which he may have agreed with defendant to adopt in furtherance of a common design to defraud another of his just rights. It must, however, be remembered, that if any improper use was to be made of the new name "Heroine," instead of "Hero," it was in fraud of the rights of the original owner of the "Hero" jar; the complainant has, however, purchased these rights, he is the owner of the original trade-mark, he has an undoubted legal right to use it, and he has seen fit to add to that name, "The Hero," the letters "ine," and to establish in the market a value to the new trade-mark.

These facts being admitted, the defendant is driven to the position that he is

trade, of title, or otherwise important to the interests of the plaintiff.¹ And a party may be restrained from using a secret, as for instance that of compounding a medicine not protected by patent, if imparted to him, to his knowledge, in breach of faith or contract. Thus A, the sole inventor and proprietor of such medicine, upon entering into partnership with B, as manufacturers and vendors of the medicine, for the purposes of the partnership, communicated to the latter the secret. By the partnership deed either party was empowered to introduce another partner, by deed, to be attested by the other; and, by mutual bonds of even date, A bound himself not to communicate the secret to any person except a partner so introduced; whilst B bound himself not to communicate such secret to any person. A afterwards introduced his sons, the plaintiffs, into the partnership; and B, shortly before his death, in breach of his bond, communicated the secret to the defendant, his son; and then, by deed, duly attested by A, appointed the defendant his successor in the partnership. Shortly after the death of B, the defendant joined A and the plaintiffs, who were ignorant that he had obtained a knowledge of the secret, in

¹ *Cholmondeley v. Clinton*, 19 Ves. 261; *Evitt v. Price*, 1 Sim. 483; *Youatt v. Winyard*, 1 Jac. & W. 394.

entitled to his peculiar trade-mark because he suggested the name to the complainant.

The law as settled will, however, hardly sustain the claim of the defendant. It was demonstrated in *Colladay v. Baird*, and the cases there cited (see 4 Ph. R. 139), that no right can be absolute in a name as a name merely; it is only when that name is printed or stamped upon a particular label or jar, and thus becomes identified with a particular style and quality of goods that it becomes a trade-mark.

In this instance the complainant has used the name, as such has established for it a reputation and a value, has doubtless expended large sums of money in introducing it to the trade, while the defendant proposes now to do that which he has not before done, for by his own agreement he discontinued the improper use of the same trade-mark stamped upon other jars, in exactly the same manner as did complainant.

If the defendant had not only suggested but had also legally used this trade-mark, he would doubtless have a concurrent right with the plaintiff, but under the evidence before us he has not, in any just and legal sense, done this, but *simply proposes to do it*, and as we have before said that the present use of the name "The Heroine," is a piratical use of the same name stamped thus, ^{The} Heroine,

we must grant the prayer of this bill. Legal Intelligencer.

executing a partnership deed, declaring the defendant a sleeping partner, and by which the partners covenanted not to divulge the secret. The defendant also afterwards executed deeds, reciting that the sole property in the secret was in A. A afterwards died, having bequeathed his property in the secret to the plaintiffs. After the determination of the partnership, the defendant made use of his knowledge of the secret communicated to him by his father, in manufacturing medicine, which he sold as the medicine originally manufactured by A. The court granted an injunction, restraining the defendant from selling, under the title or designation of "Morison's Medicine," any medicine manufactured by the defendant; and also from compounding any medicines according to the secret mentioned in the plaintiffs' bill, and from in any way making use of such secret.¹

§ 52. An injunction will be granted against publishing a magazine in the name of one who no longer authorizes it.² Or against assuming the name of a newspaper published by the plaintiff, for the purpose of deceiving the public, and supplanting the good-will of such paper.³ Or, as has been seen, against the sale, under the name of the plaintiff, with false labels, of an article of trade by the sale of which he has acquired a reputation.⁴ So an injunction lies, against the running of omnibuses, bearing names, words, and devices which colorably imitate those on the omnibuses of the plaintiff.⁵

§ 53. Equity may restrain by injunction a breach of a contract, between two copartners in the practice of medicine and surgery, not to settle in practice, after the expiration of the copartnership, within a certain distance of each other.⁶ So, where the plaintiff had sold out to the defendant the lease and good-will of a shop, giving him a bond, with penalty, against selling brandy within a certain place and a certain time; and the defendant brought an action upon the bond, and had a

¹ *Morison v. Moat*, 6 Eng. Law & Eq. 14; 9 Hare, 241.

² *Hogg v. Kirby*, 8 Ves. 215.

³ *Bell v. Locke*, 8 Paige, 75.

⁴ *Motley v. Downman*, 3 My. & C. 1; *Millington v. Fox*, *Ib.* 338.

⁵ *Knott v. Morgan*, 2 Keen, 213.

⁶ *Butler v. Barleson*, 16 Verm. 176.

verdict for the penalty: an injunction was granted to the plaintiff, in order that an issue at law might determine the amount of the damage.¹ But the court will not enjoin a judgment recovered for the consideration of the good-will of a trade sold to the plaintiff, with an agreement not to carry on the same business, and to assist the plaintiff in procuring custom, &c. Lord Eldon remarked: "The parties may ascertain for themselves what shall be the damages from time to time; and unless they are so awkward as to put that in the shape of a penalty, instead of liquidated damages, there is a perfect and absolute remedy."² So the defendant had sold to the plaintiff a newspaper published by him in D., together with its subscription list, and a printing establishment carried on by him in connection with the newspaper, "with the good-will belonging and appertaining to the same." He afterwards established in D. a new paper, of a different appearance and under a different name, and which was not, and did not purport to be, a continuation of the old paper, and in connection therewith a new printing office. A bill in equity, brought for an account and an injunction, was dismissed.³ So the defendant entered into the service of the plaintiff, a surgeon, as his assistant, agreeing not to practice within five miles of a certain village, "without the consent in writing of (the plaintiff) — under the penalty or penal sum of £100, to be recoverable by (the plaintiff) as liquidated damages, the said sum of £100 having been specified by the parties hereto, as the amount to be paid, and recoverable by (the plaintiff) against (the defendant) for the breach or non-observance of the clause." The defendant commenced practice within the distance named, and the plaintiff caused a writ to be served upon him, claiming in the indorsement £100, and also that he intended to claim a writ of injunction. Before declaration, held, the court would not entertain an application for injunction.⁴ The plaintiff, having recovered £100, again applied for an injunction against the defendant's violating the agreement. Held, this sum was to be regarded as the liquidated damages for such violation, and the injunction was refused.⁵ And the injuries

¹ Hardy v. Martin, 1 Cox, 26.

² Shackle v. Baker, 14 Ves. 468.

³ Smith v. Gibbs, 44 N. H. 336.

⁴ Carnes v. Nisbett, 7 Hurl. & N. 158.

⁵ Carnes v. Nesbitt, Ib. 778.

to the "good-will" of a trade, by the establishment of a rival enterprise, are held to be those in which some deception is practised upon the customers of the prior establishment, or upon the public.¹

§ 54. A person who had formerly been editor of the "National Advocate," a newspaper published in New York, started another paper, to be published at the same office, entitled the "New York National Advocate," and openly appealed to the friends of the "National Advocate," and to the public, to support his paper; and an injunction to restrain the publication of the new paper was refused.²

§ 55. A, with two physicians, B and C, established an insane asylum and an immigrant lazaretto. The parties quarrelled, and A obtained an injunction to restrain B and C from visiting the asylum, and they obtained one to restrain him from disposing of the asylum. Both asked for receivers. Held, that a receiver should be appointed, and, as the good-will of the concern was the most valuable part of it, the receiver should sell the concern with the good-will, and both parties should be restrained from carrying on the same business in New York, where the asylum was situated.³ (a)

¹ Snowden v. Noah, Hopk. 347.

² *Ib.*

³ Williams v. Wilson, 4 Sandf. Ch. 379.

(a) The following case, reported in the (Philadelphia) Legal Intelligencer, illustrates an important limitation of the right to protect trade-marks by injunction:—

Supreme Court. *Palmer v. Harris*. 1. Equity will not protect a party in the use of a "trade-mark" which is false on its face. 2. A label purporting that cigars were produced in Havana is not an honest trade-mark when placed on an article made in New York. Appeal from the decree of the Court of Common Pleas of Philadelphia County. In equity. Opinion by Sharswood, J.

The plaintiff, according to the statements of his bill, is the manufacturer of a cigar, known as the "Golden Crown," and he has devised a trade-mark, which he uses in its sale. He charges that the defendant, who is a printer by trade, has counterfeited this mark, and sells copies of it to persons engaged in the manufacture and sale of cigars, by whom they are used to his damage. The answer of the defendant admits these allegations; but sets up as a ground for the non-interference of the court, that the articles thus sold by the plaintiff were manufactured in the city of New York, and that the trade-mark in question contains upon it the declaration that they are the product of a "Factory of cigars from

the best plantations, de la Buena Abajo, Calle de Agua, Habana." The case having been heard on bill and answer, the bill was dismissed with costs.

The maxim which is generally expressed, "He who comes into equity must come with clean hands" (Snell's Principles, 33), but sometimes in stronger language, "He that hath committed iniquity shall not have equity" (Francis' Maxims, 5), has been often applied to bills to restrain by injunction the counterfeiting of trade-marks. The ground on which the jurisdiction of equity, in such cases, is vested, is the promotion of honesty and fair dealing, because no one has a right to sell his own goods as the goods of another. *Croft v. Day*, 7 Beav. 232. "It is perfectly manifest," said Lord Langdale, "that to do this is a fraud, and a very gross fraud." It is plain that there is no class of cases to which the maxim referred to can be more properly applied. The party who attempts to deceive the public by the use of a trade-mark, which contains on its face a falsehood as to the place where his goods are manufactured, in order to have the benefit of the reputation which such goods have acquired in the market, is guilty of the same fraud of which he complains in the defendants. He certainly can have no claim to the extraordinary interposition of a tribunal, constituted to administer equity, for the purpose of securing to him the profits arising from his fraudulent act. Thus in *Pidding v. How, Simons*, 477, the plaintiff had made a new sort of mixed tea and sold it under the name of "Howqua's Mixture;" but as he had made false statements as to the teas of which his mixture was composed, and as to the mode in which they were procured, the court refused an injunction; Vice-Chancellor Shottwell, remarking, "It is a clear rule laid down by courts of equity not to extend their protection to a person whose case is not founded in truth." In *Havel v. Harrison*, 10 Hare, 467, an injunction was refused when an article was sold by the name of Havel's Patent Kitchener, for which there never had been a patent. In *Leather Cloth Company v. American Leather Cloth Company*, 11 House of Lords Cases, 533, though decided on the ground that the mark used by the defendants was substantially different from that of the plaintiffs, yet it may be fairly inferred from all the opinions that, if necessary, the decree of Lord Chancellor Westbury would have been affirmed on the broader ground. Thus a company, which had gained reputation by a particular manufacture, on discontinuing their business, transferred their stamp or trade-mark, which indicated them as the manufacturers, to other parties; and it was the opinion expressed that such assignees would not be protected in equity in the use of that mark on goods manufactured by themselves. "So" said Lord Cranworth, "in the cases of bottles or casks of wine stamped as being the growth of a celebrated vineyard, or cheese marked as the produce of a famous dairy, or of hops stamped as coming from a well known hop-garden in Kent or Surrey, no protection would be given to the sellers of such goods, if they were not really the produce of the place from which they purported to come." It is contended, however, that this case is different, because there were marks or words used with these labels inconsistent with the idea that they were held forth as manufactured in Havana. On the label is printed, "Entered according to Act of Congress, A. D. 1858, by Lorin Palmer, in the Clerk's Office of the Southern District of New York." Apart from the fact that this is in such very small type and so abbreviated that it would probably escape the observation of every one, whose attention was not specially directed to it, a circumstance which rather strengthens the evidence of an intention to mislead the public, what is there in the fact that the design or engraving had been copyrighted in the United States, inconsistent with the declaration that the cigars, contained in the box, were

manufactured in Havana, of Cuban tobacco? But, again, it is said that the United States internal revenue stamp would at once undeceive the purchaser, there being a difference between the stamp used for articles imported and for those of domestic manufacture. Few persons would stop to notice this difference, and besides, as it is alleged, the trade-mark is pasted on the inside of the lid, and when the box is open for the purpose of retailing the trade-mark is brought directly in the view of persons wishing to purchase, and the revenue stamp is not seen unless the lid is turned down and the box examined on the outside. It is contended, further, that the falsehood is in a foreign language, of which it is to be presumed that the plaintiff's customers are ignorant. Yet there is certainly enough to convey to every one, who can read, that the cigars are from "Havana." It is true that when a slander is uttered in a foreign tongue it is necessary, in an action for damage, to prove that the hearers understood the language; for it will not be presumed that being ignorant of the meaning of the words, they afterwards repeated them to those who understood them (2 Starkie on Slander, 52); but there is no such rule in an action for a libel in a foreign language, for *litera scripta manet*; that may be read and explained by those who do not understand it. The case of a written or printed libel has a much closer analogy to the point before us than that of spoken slander. But above all this it is not necessary that any one person has been actually deceived or defrauded; it is enough that it is a misrepresentation calculated to have that effect on the unwary and unsuspecting.

Decree affirmed and appeal dismissed at the costs of the appellant.

CHAPTER XXVI.

ROADS; RAILROADS; CANALS; BRIDGES; FERRIES.

- 1. Roads.
- 3. Railroads; general rules and practice.
- 7. Nature of the charter.
- 8. Judgment of other tribunals; commissioners, &c.
- 12 a. Conflicting railroads.
- 14. Conflict with other privileges; roads, bridges, mills, &c.
- 22. Land-owners; taking of land.
- 28 a. Departing from the purpose or exceeding the authority given by the charter.
- 30. Stockholders; dividends, &c.; bond-holders; contractors.
- 37. Insolvency.
- 38. Canals.
- 41. Bridges.
- 44. Ferries.

§ 1. INJUNCTIONS are sometimes applied for in reference to public roads.

§ 1 a. As we have already seen (see *Nuisance*), a private individual cannot maintain an action in his own name, to recover damages for an obstruction to a highway, and to restrain a continuance of it, where he does not aver or prove special damages to himself.¹

§ 1 b. Where a company, incorporated to construct a plank road, had completed their road, put it in use, and erected a toll-gate opposite the defendant's land, and the defendant opened and worked a road on his own land parallel to, and adjoining the plank road, so that it was passable for travellers, and was used by them to pass the gate, to the prejudice of, and loss of toll to the company; held, the court might restrain the defendant by perpetual injunction from keeping

¹ *Carpenter v. Mann*, 17 Wis. 155.

his road open, or permitting it to be kept open, so as to be used for the public travel; and order that it be so closed, as to hinder persons travelling on the plank road from using it as an open road.¹

§ 2. Equity will not, on the application of trustees of a turnpike road, passing over a hill, who were empowered to lower it when necessary, restrain an adjoining freeholder from making a tunnel under the road, on the ground that it would obstruct the future improvement of the road.²

§ 2 a. If a city (in Massachusetts), laying out a street so as to compel the removal of buildings, assess to the owner a certain sum in lieu of all damages for such removal; his remedy, if aggrieved, is by petition for a jury, not by injunction.³

§ 2 b. A land-owner may enjoin the construction of a *turnpike*, where the land-damages have not been assessed and tendered.⁴

§ 2 c. Where a law requires that a road shall be opened within five years after location; this means the *entire* road. If only a part of it is thus opened, this is done under color of law, which would be a defence against an action for damages. Hence, where an attempt is made to open only a part, but one day before expiration of the five years; such opening may be restrained by injunction.⁵

§ 3. The remedy of injunction, as of other forms of action, is often invoked in reference to *railroads*. Many of the rules of law upon the subject will be found referred to in other connections; more particularly in the chapter (XV.) relating to corporations.⁶ (a)

¹ *Auburn, &c. v. Douglass*, 12 Barb. 553.

² *Cunliffe v. Whalley*, 17 Eng. Law & Eq. 503.

³ *Nichols v. Salem*, 14 Gray, 490.

⁴ *Sidener v. Norristown, &c.*, 23 Ind. 623.

⁵ *Green v. Green*, 34 Ill. 327.

⁶ See *Gregg v. Baltimore*, 14 Md. 479; *Spooner v. McConnel*, 1 McL.

(a) It has been thought worthy of distinct adjudication, that railroads over

§ 4. In a late case it is remarked, "I think it most essential to the interests of the public, that such jurisdiction should exist, and should be exercised whenever a proper case for it is brought before the court, otherwise the result may be, that, after your house has been pulled down, and a railway substituted in its place, you may have the satisfaction, at a future period, of discovering that the railway company were wrong."¹ And in another case, where, after an injunction against a railroad company, restraining them from so constructing the railway as to obstruct, impede, or render less secure the road in question, the defendants laid permanent rails, on a level, and by order of the commissioners erected gates and opened the line: upon the ground that "their conduct was at once contemptuous and otherwise illegal, wrongful as against the plaintiff, her Majesty's subjects at large, and indeed a bad, almost a scandalous example — a daring invasion of public and private rights;" the court ordered a sequestration.²

§ 5. In the State of Pennsylvania, the equity power of injunction was disclaimed in reference to a railroad corporation, by reason of the restrictive terms of an express statute; but the observations of the eminent judge, who delivered the opinion of the court, indicate the practical value and importance of this summary jurisdiction.

§ 6. In the case of *Hays v. The Pennsylvania Railroad*,³ it was held that the equity powers of the Supreme Court, in

338; *M'Arthur v. Kelly*, 5 Ohio, 139; &c., 3 Whart. 502; *Browning v. Camden*, &c. *v. Curtis*, 1 Clarke, 336; den, &c., 3 Green, 47.
Agar v. The Regent's, &c., Coop. 77; ¹ Per Lord Cottingham, *River, &c. v. North, &c.*, 1 Railw. Cas. *v. North, &c.*, 1 Railw. C. 135.
135; *Sandford v. The Railway Co.*, 24 ² The Atty., &c. *v. The Great, &c.*,
Penn. 378; *Amelung v. Seekamp*, 9 ³ Eng. Law & Eq. 263.
Gill & J. 468; *Jarden v. Philadelphia*, ⁴ 17 Penn. 9.

streets of towns and cities, made with their consent, and by legislative authority, are not public nuisances. *Milburn v. Cedar, &c.*, 12 Iowa, 246; *Hughes v. Mississippi, &c.*, *Ib.* 261.

A motion for a temporary injunction to restrain the construction of a railroad was denied, as being a violation of the spirit of the rule, which forbids the issuing of an injunction to restrain the construction of a public work, authorized by a law of the State, until after hearing upon the rule to show cause. *Delaware, &c. v. Raritan, &c.*, 1 McCart. (N. J.) 445.

reference to corporations other than municipal, by the statute of 1836, if not restricted to Philadelphia, are nowhere any greater than those of a court of common pleas. Hence the Supreme Court, sitting at Harrisburg, cannot control the doings of the Pennsylvania Railroad beyond the county of Dauphin. Gibson, C. J., remarks, "Had the power been conferred upon the Supreme Court alone, it would have enabled us to retain the present bill, but, conferred in the same clause upon the Common Pleas, it leads irresistibly to the conclusion that the design was to give them exactly the same jurisdiction. The Supreme Court, standing on a foundation no broader, and exercising a jurisdiction not more extensive than the foundation and jurisdiction of a court of common pleas, could not supervise or control the proceedings of a corporation whose field of action extends from the Susquehanna to the Ohio. — '*Noscitur a sociis.*' It is unnecessary to ask why such jurisdiction has been withheld. It has been the policy of the legislature, from the foundation of the province, to dole out equitable power to the courts with a parsimonious hand. Happily this policy is fast yielding to a more enlightened one. Though the power to issue writs of injunction is a despotic one, which ought to be exercised in the first instance with great caution, and only in the clearest and most indisputable cases, it is an invaluable and indispensable one. A writ of quo warranto would lie in a case like the present; but the object of a corporator is not to destroy the charter, but to preserve it. Gigantic corporations may acquire, from combination of capital and the patronage they create, a dangerous influence; and the legislature could curb it only by the instrumentality of the judiciary; but to make the instrument effective, would require it to be invested with an adequate degree of power."¹

§ 7. The granting of a right of way to a street railroad, by the common council of a city, is not an act of legislation, but a grant upon condition, and may be restrained by injunction.² But an injunction has been refused when applied for

¹ 17 Penn. 12, 13.

² *People v. Sturtevant*, 5 Seld. 263.

upon the ground that a railroad charter was unconstitutional.¹ (a)

§ 7 a. In an action to obtain an injunction against a company attempting to build a railroad, under a grant from a city, where it is claimed that the city has disposed of the right on an insufficient consideration, and in violation of the city charter; the city corporation is a necessary party. Also, where it is claimed that the officers have abused their powers.²

§ 8. The question of injunction often depends upon the judgment or action of some tribunal other than the court to which the petition is addressed.

§ 9. In New Jersey, though, in the opinion of the chancellor, the Somerville and Easton Railroad Company could not apply for commissioners of valuation and damages until the route of the whole road should be located; yet he refused an injunction to restrain the company from applying for commissioners to value a part located, before a location of the whole route.³ And it is said an injunction lies to restrain the opening of a road, where the railroad commissioners had ordered a postponement of such opening.⁴

§ 10. Upon the question of arching over a street in connection with a station, an action was ordered before the Barons of the Exchequer to settle the point whether "it was necessary or reasonably convenient." Upon their answering in the affirmative, held, the injunction should be dissolved.⁵

¹ *Deering v. York, &c.*, 31 Maine, 172.

² *People v. Law*, 34 Barb. 494.

³ *Doughty v. Somerville, &c.*, 3 Halst. Ch. 51.

⁴ *Redf. on Railw.*, 488.

⁵ *Atty., &c. v. The Eastern, &c.*, 2 Railw. Cas. 823.

(a) Equity may enjoin a railway to run trains at particular times, under the railway and canal traffic act, 1854, without proof of individual grievance; but there must be a public inconvenience. *Barret v. Great Northern, &c.*, 38 Eng. Law & Eq. 218. The court, in judging what is reasonable accommodation, will consider the general traffic of the railway, and the accommodation which such traffic requires. *Ib.*

§ 11. Questions of *engineering* are ordinarily referred to an engineer.¹

§ 12. A railway company were building an embankment more than five feet above the level, according to the 11th and 12th sections of the railway clauses consolidation act. They had not given the notice required by the 12th section, but had obtained the consent required by the 11th. The court put them on terms to take the opinion of the *board of trade*, submitting to such order as this court should thereafter make ; otherwise an injunction would go to restrain the company from proceeding with the embankment.²

§ 12 a. The conflicting rights of different railroads, or of a railroad corporation and other companies or individuals, often call for the remedy of injunction.

§ 13. Where a company was authorized to make a direct line of railway, with a branch, and was about to complete and open the direct line, but had abandoned the branch line ; held, the attorney-general had no right to file an information to restrain the opening of the direct line, as a means of compelling the completion of the branch, alleging that the abandonment of the branch line was an injury to the public.³ And it is held that, upon an injunction bill, equity will not decide upon the legal title of two railroad companies to a certain route.⁴ (a)

¹ Webb v. The Manchester, &c., 4 My. & Cr. 116.

³ Attorney-General v. The Birmingham, &c., 8 Eng. Law & Eq. 243.

² Pearce v. Wycombe, &c., 19 Eng. Law & Eq. 122.

⁴ Morris, &c. v. Blair, 1 Stockt. 635.

(a) It may seem not inappropriate to insert here a newspaper report, probably accurate in substance, of a late case involving the rights of two railroad corporations : —

" THE GREAT RAILROAD CASE. — The United States Circuit Court, Judges Davis and Treat, yesterday, refused the injunction prayed for by a portion of the stockholders in the Galena and Chicago Railroad Company, to restrain the consolidation of that road with the Northwestern Railroad Company, and for the appointment of a receiver, &c. The court, in refusing the injunction, declined to decide upon the merits of the case ; but, nevertheless, the decision is a virtual refusal to set aside the consolidation. One of the strongest points made in the argument was, that the consolidation, which was made over a year ago, was of so gigantic a character that, to overturn and destroy it at this day, was

So A, a railway company, had entered into a contract with B, another company, as to the working of their line. A now alleged that the contract was void, and proposed to enter into an agreement with the C company, the effect of which would be a violation of the contract with B. B moved for an injunction to restrain A from holding a meeting to sanction the agreement. The court refused to interfere, as it was not clear that the contract with B was valid, and as the loss of A from not entering into the agreement with C might be greater than their loss from violating the contract with B.¹ But, in Pennsylvania, an injunction was granted, in a case turning wholly upon the construction of the charter under which the defendants claimed, and indeed upon the meaning of particular words in that charter (which however must be read at length, in order to understand the precise points in controversy). The history of this case, as given in the opinion of the court, is as follows: "In 1837, the legislature incorporated the Sunbury and Erie Railroad Company, with authority to make a railroad from Sunbury to Erie, but without any authority to extend their work *further south or east than Sunbury*. By this, their original charter, they had no more right

¹ *Shrewsbury, &c. v. Shrewsbury, &c.*, 4 Eng. Law & Eq. 171.

to disturb a system of railways, and overthrow a series of financial and commercial operations, affecting the property and business of thousands of people, who, in no way connected with the consolidation itself, have in good faith acted upon its existence. The court evidently felt the force of this consideration, and therefore refused an injunction, or any other proceedings calculated, however remotely, to disturb the immense interests involved, and the vast works in operation by the consolidated companies. They virtually, if not in fact, decided, that the consolidation was to stand, but that the non-consenting stockholders should be made whole as to the value of their property on the day the consolidation took place. This reduces the question at issue to a mere pecuniary one, namely, how much the stockholders of the Galena Road are equitably entitled to for their interest? The terms of the consolidation offered them a certain sum; they claimed a greater; the difference between the two valuations is possibly somewhere between fifty and eighty thousand dollars. The great point, however, in which the public are interested is that decided by the court — that the consolidation will not be disturbed or set aside. The amount which the non-consenting stockholders may justly claim is a matter affecting only themselves and the corporation; the public may dismiss their fears that the consolidation which, in its vast scheme, includes so inextricably so many interests, will be broken. That point determined, the other questions involved are of mere personal interest." *Chicago Republican*, July 9.

to make a road from Sunbury to Harrisburg than if they had never been incorporated at all. Such was the state of things in 1851, when the charter was given to the Susquehanna Company. The act which brought the latter company into being gave them the privilege of constructing their railroad along the Susquehanna River between Harrisburg and Sunbury, by a route to which nobody else had any right or pretence of claim. On the faith of this unequivocal grant of authority to construct their work on a track then entirely open to their enterprise, they raised the capital necessary for the purpose, and prepared to commence it. It is at this stage of their progress that the Sunbury and Erie Company set up their claim as grantees from the State of the same privilege, and assert that they, too, have a legal right to make a road between the same termini, along the same valley, and by the same intermediate points. Did the legislature intend that these two companies should each have equal authority to construct the same identical work? It seems to us extremely improbable. The struggle between two companies, invested with the same privileges, each having an equal right to the ground, would be more likely to end in the ruin of both, than to give either a fair chance of success. Legislation like this would not only be injurious in its effect on the public interest, but it would be a wrong on the company first incorporated — such a violation of justice as no one would expect to see perpetrated by the representatives of a people who love the right and hate the wrong. The improbability that the rival corporations were intended to be clothed with equal power to make the same road along the same route, is infinitely increased when we find that no provision is made for settling the innumerable disputes which must necessarily arise between them. We assume that it is practicable to make both roads, nevertheless the choice of the best location may be of such immense value to the party which gets it that it would be fiercely contended for. How is such a contest to be settled? Shall it be determined by the wager of battle? The struggle would not cease with the survey; and when the building of the two roads would bring thither thousands of excitable men, the probability of violence and bloodshed would be very great.

Supposing the road to be made, and the cars and locomotives running side by side, and sometimes crossing each other's track, what hope could be entertained that they would regard each other's convenience and interest in such a manner as to keep the peace and avoid collisions dangerous to property and life ? " ¹

§ 13 a. One railroad company may enjoin another rival company from placing an obstruction, partly on a public foot-way and partly on the plaintiffs' land, thereby blocking up the access to a station of the plaintiffs; the bill alleging that the injury to the plaintiffs' traffic would be irreparable, and that the defendants had no color of title.²

§ 13 b. The A and B railroad, incorporated to run a road from A to B, was sold under a mortgage, and the stockholders organized as a corporation under the old charter and name. Afterwards a new company was chartered, to continue the road, called the B and A railroad company; the two companies then formed one organization, and the legislature authorized the latter to buy out the former, and then to assume the name of the Central Railroad Company of New Jersey, the plaintiffs, which should be liable for all corporate debts contracted since foreclosure of the mortgage. The defendant brought an action against the A and B company for a debt prior to foreclosure, serving a summons on C, the president of both companies; and the plaintiffs bring their bill to enjoin such suit, alleging that from the manner in which it was brought, and under the circumstances, they could not know which company was intended to be served. Held, an action was maintainable against the first corporation, but not against the plaintiffs, and they had a right to be informed, which company was intended to be sued; and, the answer not disclaiming an intention of holding the plaintiffs, the injunction should be continued until their liability should be shown.³

¹ Per Black, C. J., *Packer v. Sunbury, &c.*, 19 Penn. 216.

² *London, &c. v. Lancashire, &c.*, Law Rep. (Eng.) Eq., July, 1867, p. 174.

³ *Central, &c. v. Bunn*, 3 Stockt. 336.

§ 13 c. The charter of the plaintiffs, a railroad corporation, provided, that no other railroad should be authorized for thirty years, from Boston, Charlestown, or Cambridge, to Lowell, or to any point within five miles of the northern terminus of the plaintiffs' road. The defendants, other corporations, so connected their roads, as to make a continuous line, from Boston to Lowell, by way of Salem and Lawrence. Upon application for an injunction, held, whether the legislature might or might not have constitutionally chartered a new road directly from Boston to Lowell; they had not done so, and the defendants' proceedings were a virtual infringement of the plaintiffs' charter, without legislative authority therefor; and a perpetual injunction was granted.¹

§ 14. A very common application for injunction, is that made on behalf of some other privilege with which a railroad comes into competition or collision. Thus the defendants, a railroad company, were enjoined, on application of the State, from filling up a part of the State canal, and erecting an arch over it, which would obstruct its use; though this portion of the canal had been for many years abandoned, and without regard to the question of damage.²

§ 14 a. An injunction was granted against the use of streets and public landings for a railroad track, in favor of an owner in fee, specially injured.³

§ 15. In case of petition for an injunction, restraining the defendants, a railroad company, from crossing the road of the plaintiffs, except by a bridge; the question of right was sent to the Court of Exchequer, who found for the plaintiffs. Held, an injunction should be suspended, in order to give time for building the bridge, the defendants undertaking to build it as speedily as possible.⁴

¹ *Boston, &c. v. Salem, &c.*, 2 Gray, 159; acc. *Hudson, &c., Canal v. New York, &c.*, 9 Paige, 323.
² See *Enfield, &c. v. Hartford, &c.*, 17 Conn. 40; *Mohawk, &c. v. The Utica, &c.*, 6 Paige, 554.

³ *Com. v. Pittsburg, &c.*, 24 Penn.

⁴ *Schurmeier v. St. Paul, &c.*, 10 Min. 82.

⁵ *Northern, &c. v. The London, &c.*, 1 Railw. Cas. 653.

§ 16. An injunction was granted to prevent an improper mode of carrying a turnpike over a railroad.¹ So where the highway commissioners, on petition of the defendant, had laid out and recorded a private way from his land across the ropes and fixtures of the inclined plane of a railway.² And, on the other hand, an injunction was denied, to restrain the removal by a turnpike road of stone blocks laid across the road by a railroad company, in order to pass from the railroad to a wharf; the charter only authorizing the company to use the turnpike as it was, or requiring a tunnel or bridge if they crossed the road.³

§ 16 a. The location of a railroad through a public street, in a line not warranted by law, will not be enjoined at the instance of an owner of an unimproved building lot, suffering no present detriment.⁴

§ 17. An injunction has been denied in favor of a toll-bridge against a railroad bridge.⁵

§ 17 a. In 1790, the legislature authorized A to build a toll-bridge across the Harlem River, a navigable river, and also provided, that no other bridge or ferry should be erected or maintained between the two places connected thereby, except for the private use of the inhabitants of those two places. In 1832, a railroad company was authorized to cross the same river near A's bridge. A bridge having been previously built for the private use of the inhabitants, according to the reservation in the grant to A, the railroad company purchased and used it for their railroad, which use diminished the receipts of A's bridge. Held, that the charter to the railroad company, and the use of the bridge for the railroad, were no violation of the grant of a franchise to A, and that he could not restrain them by injunction. Also, that the railroad com-

¹ Atty., &c. v. London, &c., 3 De G. & S. 439.

² Mohawk, &c. v. Artcher, 6 Paige, 83.

³ London, &c. v. Cooper, 2 Railw. Cas. 312.

⁴ Zabriskie v. Jersey, &c., 2 Beasl. 314.

⁵ Tucker v. Cheshire, &c., 1 Fost. 29. See § 41.

pany, having been authorized to build a bridge for their railroad, were thereby authorized to buy, for the same purpose, a bridge already built. That the owners were also authorized to sell their bridge as they had done. That the railroad company might be restrained by injunction from allowing persons to cross their bridge who were not authorized to cross by law. That the defendants could not object, in a suit to restrain a violation of a franchise which had become vested in the grantee, that the complainants had violated their franchise: there having been no judicial forfeiture of the franchise, it could not be impeached collaterally. That a provision in the grant of the franchise to A, that treble tolls might be recovered before a justice for a violation of his franchise by others, did not preclude a suit in equity for an injunction and account; and a court of equity had jurisdiction to grant such injunction, but would not enforce the penalty given by the grant. And that, in case of a violation by a corporation, who could not be sued before a justice, the necessity of the case would warrant another remedy.¹

§ 18. Where obstructions to public navigation are about to be erected, and after erection can be removed only at great expense; an injunction may be decreed. Thus a railroad company, authorized to erect a bridge over a navigable stream, in such a way as "to do the least possible injury to navigation," who are about to construct it in a place where the evidence tends to show that more injury would be done to navigation than in others, may be restrained, until the question whether that is the proper position can be determined.²

§ 19. A railroad may be compelled by injunction to build an arch over a mill-race of such dimensions as would secure the mill from injury; the act requiring compensation for all damage.³ While, on the other hand, a railroad company, alleging a right of way over a certain strip of land, and that the defendant is about to erect a flouring mill so near their

¹ *Thompson v. New York, &c.*, 3 Sandf. Ch. 625.

² *Coats v. The Clarence, &c.*, 1 Rus. & My. 181.

³ *Attorney-General v. Hudson, &c.*, 1 Stockt. 526.

track as not to leave sufficient room for its repair and construction, may have an injunction to restrain the erection of the mill.¹

§ 19 a. The charter of a railroad provided, that, whenever it should be found necessary to cut through, take, or so much injure any part of any quay, wharf, or other communication, as to render it impassable or inconvenient for transporting, &c., any goods; another, equally convenient, should be constructed. The plaintiff, proprietor of a wharf, brings a bill to enjoin any works that would render the wharf inconvenient, pending an action at law, which involved the question, whether the defendants had not violated their charter by carrying the road in front of the wharf, so as to cut off its general access to the water, and making a jetty between the wharf and the water. It further appeared, that the prosecution of the work would not cause any additional injury. The injunction was granted.²

§ 20. The fact, that a railway has been located on some part of the tract, of eighty acres of land, purchased for the use of an institution for educating the deaf and dumb, does not alone authorize the conclusion, that the uses and purposes for which the institution was placed on that particular tract will be so materially interfered with, that the company should be restrained from crossing it.³ (a)

§ 21. An owner of lots upon a street, upon which a railway is about to be constructed, which will be specially injurious to him, may maintain a suit to enjoin such construction.⁴ So from taking down fences and opening a road through land

¹ *Cunningham v. Rome, &c.*, 27 Geo. 499.

² *Bell v. Hull, &c.*, 1 Railw. Cas. 616.

³ *Indiana, &c. v. State*, 3 Ind. 421.

⁴ *Milhan v. Sharp*, 28 Barb. 228.

(a) In a late case, an injunction was granted upon the allegation, that "the *ranch* of the plaintiff through which it is proposed to open the road is of symmetrical proportions and easily cultivated, and the passage of the road will greatly disfigure the *ranch*, and largely increase the expense, and render it much more difficult to cultivate." *Champion v. Sessions*, 1 Neva. 478.

under a premature order of supervisors.¹ So if a railroad company, before assessment and payment of damages, begins the work of laying its track over a street, the abutters are entitled to an injunction to prevent their laying the track, digging up the soil, or otherwise encumbering or obstructing the street.² But, under the New York statute, incorporating the Auburn and Rochester Railroad Company, where the map, plan, and profile, accompanying the petition of the company, for the appointment of a jury of appraisers, did not show any contemplated viaduct for the use of the owner of lands which were divided by the railroad; held, such owner could not enjoin the company from building their road in such a way as to allow him no viaduct, notwithstanding the counsel for such company may have argued to the jury of appraisers, that the company were bound to make proper crossing places.³

§ 22. The taking of land for railroad purposes has given rise to many applications for injunction.⁴ (See Appendix.)

§ 23. If a railroad company neglect to pay the owner of land the damages awarded for the right of way; equity will enjoin them from using the land until the damages are paid.⁵ So where a railroad company was directed by the charter to locate its road, and deposit a survey in the office of secretary of the State, and, when that should be done, might construct the road, subject to compensation for land and materials taken, to be decided on by commissioners appointed by a judge of the Supreme Court on application of the corporation, when the owners could not agree with the corporation; and the corporation proceeded to construct their road through lands of an individual without his assent, and without performing either of the above conditions: held, they should be enjoined until those conditions were complied with.⁶ So, in Maryland, under the constitution, Art. 3, § 46, it is sufficient ground to

¹ Grigsby v. Burtnett, 31 Cal. 406.

² Ford v. Chicago, &c., 14 Wis. 609.

³ Kyle v. Auburn, &c., 2 Barb. Ch. 489.

⁴ See People v. Law, 34 Barb. 494; Stone v. The Commercial, &c., 4 My. & Cr., 122; River, &c. v. North, &c., 1

Railw. C. 135; Mouchett v. The Great, &c., 1 Ib. 567.

⁵ Stewart v. Raymond, &c., 7 S. & M. 568.

⁶ Bonaparte v. Camden, &c., Baldw. 205.

enjoin a railroad from entering upon land, that they have not paid or secured the damages. An averment of irreparable injury is unnecessary.¹ So an injunction may be had against entering upon land, until the opening of a street through which the railroad was required to pass.² Or for summoning a jury to appraise a less quantity of land than the corporation had given notice of taking.³ Or to restrain a railroad from taking land for a warehouse four hundred yards from their track, and making a track to such warehouse.⁴ So where A, one railroad company, took the plaintiff's land and built their road, and then leased it to B, another: a part of the purchase-money remaining unpaid; held, he might maintain a bill against both companies, praying for payment of the money or an injunction against the use of the land; and, although not according to the ordinary practice, an order was passed, on motion, that A should pay the money, otherwise both companies should be thus restrained. (Sir G. J. Turner, L. J., did not concur, and thought that a receiver should be appointed or some other course adopted.⁵) But an injunction has been held not to lie against a *merely void* taking of land.⁶ So after the railroad had been built, though the land had been obtained from a tenant of the plaintiff by fraud.⁷ And an injunction is sometimes granted, on condition of bringing an action.⁸

§ 24. An injunction does not lie, if the charter provides for an appraisal.⁹

§ 25. An injunction, for non-payment of land damages, was dissolved, on payment of the sum into court, though the charter required a payment into the Bank of England.¹⁰ Or

¹ *Western, &c. v. Owings*, 15 Md. 199.

² *Jarden v. Philadelphia, &c.*, 3 Whart. 502.

³ *Stone v. The Commercial, &c.*, 4 My. & C. 122.

⁴ *Bird v. W. & M., &c.*, 8 Rich. Eq. 46.

⁵ *Cosens v. Bognor, &c.*, Law Rep. (Eng.) Eq., December, 1866, p. 593.

⁶ *Mouchett v. The Great, &c.*, 1 Railw. Cas. 567.

⁷ *Deere v. Guest*, 1 My. & Cr. 516.

⁸ *Kemp v. The London, &c.*, 1 Railw. C. 495; *Bell v. The Hull, &c.*, 1 Ib. 616.

⁹ *New, &c. v. Connelly*, 7 Port. (Ind.) 32.

¹⁰ *Hyde v. The Great, &c.*, 1 Railw. Cas. 277.

it may be suspended, upon a stipulation for speedy payment.¹ (a)

§ 26. In a late case, the vice-chancellor, acting on the authority of *The London, &c. v. Smith* (1 Mac. & Gor. 216), granted an *ex parte* injunction, on the application of a railway company, restraining the land-owner from taking proceedings under the 68th section of the land clauses consolidation act, 1845, for settling the amount of his compensation. His Honor subsequently dissolved the injunction, on the authority of *The East, &c. v. Gattke* (3 Mac. & Gor. 135 ; 3 Eng. Rep. 59). In the meanwhile, the time limited for taking proceedings under the 68th section had expired. The company, who had not raised the question before the vice-chancellor, appealed from the order dissolving the injunction, on the ground that it ought to have been made on such terms as that their rights to take proceedings under the 68th section might not be affected by the lapse of time. The Lord Chancellor refused the application.²

§ 27. A railway company paid for and took a conveyance of a piece of land from A, and B afterwards claimed the land, and moved to restrain the company from taking it, their compulsory powers having expired ; and the evidence of title was conflicting between A and B. Held, B had his remedy by ejectment ; and the injunction was refused.³ On the other hand, where a railway had been made across the road leading to a farm, and the land-owner served a notice on the company under the land clauses act, claiming £550 as compensation, or requiring the company to summon a jury to assess the compensation ; and the company filed their bill, alleging that the damage complained of was not an injury affecting the land,

¹ *Jones v. The Great, &c.*, 1 Railw. C. 684.

² *Webster v. Southeastern, &c.*, 1 Eng. Law & Eq. 204.

³ *South, &c. v. Hall*, 7 Eng. Law & Eq. 30.

(a) As to injunction against the taking of land, where the success of the undertaking is doubtful ; see *Agar v. The Regent's, &c.*, Coop. 77 ; *The Mayor, &c. v. Pemberton*, 1 Swanst. 244 ; *Salmon v. Randall*, 3 My. & Cr. 439 ; *Lee v. Milner*, 2 M. & W. 824.

within the land clauses act, and obtained an *ex parte* injunction to restrain the land-owner from taking any other proceedings under that act: held, the injunction could not be maintained.¹

§ 27 a. A railroad company altered its road-bed so as to lay it across land of the plaintiff, induced thereto by his request, and his promise to give them the right of way, which was not binding at law, nor such as would support a suit for specific performance. Held, that he could not enjoin the company from using their new track, until they had made him compensation for the land taken.²

§ 27 b. Where a lateral railroad is constructed, under an agreement with the land-owner that the road shall be built in a certain way, and with a turnout for his benefit; the remedy for violation of this agreement is not by injunction, but by action for the damages.³

§ 27 c. The (Michigan) statute, 1858, c. 80, authorizing an injunction against the use of land taken by a railroad, till paid for, does not apply where the land has been taken with consent of the owner.⁴

§ 27 d. The defendants, a railway company, by agreement with the plaintiff, were let into possession of his land, which they required for their line, giving bond for the price. The price not being paid, he files a bill for specific performance for a lien, and an injunction. Held, he could not have an injunction against their continuing in possession until payment, though he might perhaps be entitled to a receiver, or to have the money paid into court.⁵

§ 27 e. The defendants, a railway, having power to purchase of the plaintiff certain land, entered to survey and take

¹ South Staffordshire Railway Co. v. Hall, 3 Eng. Law & Eq. 105.

² Pettibone v. La Crosse, &c., 14 Wis. 443.

³ Pusey v. Wright, 31 Penn. 387.

⁴ Vilas v. Milwaukee, &c., 15 Wis. 233.

⁵ Pell v. Northampton, &c., Law Rep. (Eng.) Eq., February, 1867, p. 99.

levels and probe or bore in order to test the soil, and to set out the centre line of the road; and for that purpose they dug a trig line or trench two inches deep and fourteen inches wide across the lot, but without the statutory notice. Five days after the trig line was made, the plaintiff discovered it, and nine days after the discovery filed a bill for injunction. The defendants made affidavit that the surveying and setting out of the line of the road was completed on the day the trig line was made, and that they had no occasion to, and should not again enter, until they had taken the legal steps for permanently using the land. Injunction refused, but question of costs reserved.¹

§ 28. An injunction against taking any more of the plaintiff's land than is necessary, for the purpose of making and maintaining the railway and works authorized by the act, was pronounced by Lord Cottenham "a very objectionable form of order."²

§ 28 a. A railroad may be enjoined from taking up the rails upon a part of its road, where the public will be thereby incommoded, driven to a more circuitous route, and compelled to transship freight, without any object of public interest or accommodation; while the defendants will not be materially prejudiced by the injunction.³

§ 29. A railroad may be restrained by injunction from carrying passengers, in a city, from their own station to that of another railroad, without authority in their charter.⁴ Or from building a platform and stairs at a place where a station was expressly prohibited.⁵ Though not from taking and leaving passengers at such place, or renting rooms in a public house for their accommodation.⁶ So, under St. 17 & 18 Vict. c. 31, a railroad may be enjoined against requiring other

¹ *Fooks v. Wilts, &c.*, 5 Hare (26 Eng. Cha.), 199.

² *Cother v. Midland, &c.*, 2 Phill. 469. See *Great, &c. v. The Clarence, &c.*, 1 Coll. 507.

³ *People v. Albany, &c.*, 37 Barb. 216.

⁴ *Mayor, &c. v. Macon, &c.*, 7 Geo. 221.

⁵ *Lord Petre v. The Eastern, &c.*, 3 Railw. Cas. 367.

⁶ *Eton, &c. v. Great, &c.*, 1 Railw. Cas. 200.

carriers to bring their goods to the station at an earlier hour than the road received its goods delivered at its own receiving offices.¹ (a) But that a corporation, authorized to construct a railroad from C to A, with liberty to make a lateral road to B, proposes to construct its main road through B (no route having been designated between C and A), is not sufficient ground for an injunction.² And although a railway company may have engaged in an illegal transaction, yet, if they afterwards obtain an act of Parliament to sanction it, the court will not restrain them from proceeding, though the effect of the act may be doubtful.³ So, upon an application to restrain a railway company from prosecuting certain works, if it appears that they intend to abandon the work, the court will not grant the injunction.⁴

§ 30. Injunctions are often applied for by the stockholders of railroads.⁵

§ 31. An injunction will be granted, on the application of a stockholder, to restrain a railroad from making a dividend, contrary to the charter, till completion of the works.⁶ Though it is otherwise where the charter makes no provision on the subject.⁷ So the defendant corporation, of which the plaintiff was a member, obtained an act of the legislature to extend their railroad beyond the terminus named in their original charter, and accepted the act, by a majority vote, against the wishes of the plaintiff. Held, this was a fundamental change in the purposes of the corporation, not binding upon the incorporators without their consent, and the plaintiff was entitled

¹ *Baxendale v. London, &c.*, 12 C. B. N. S. 758.

² *Bonaparte v. Camden, &c.*, Baldw. 205.

³ *Logan v. Courtown*, 5 Eng. Law & Eq. 171.

⁴ 5 Eng. Law & Eq. 171.

⁵ See *Bagshaw v. The Eastern, &c.*, 7 Hare, 114.

⁶ *Allen v. Talbot*, 30 Law Times, 816.

⁷ *Brown v. Monmouthshire, &c.*, 4 Eng. Law & Eq. 113.

(a) If a railroad, chartered between A and B, operate only between A and C (a way-station between A and B), and abandon the rest of the route; its charter may be vacated, or its corporate existence annulled, by an action in behalf of the people. A suit in equity on behalf of the State, to compel maintenance of, and operation over, the whole route, will not lie. *People v. Albany, &c.*, 24 N. Y. (10 Smith) 261. (See § 31.)

to an injunction against such appropriation of their funds or credit.¹ So an injunction will be granted in favor of holders of *preference shares*, to enjoin a general dividend, while the company are liable to a deficit arising from forgeries committed by an officer.² And where the directors of a company had entered into a contract, the legality of which was doubtful, to expend money in laying down rails; they were restrained, at the suit of some of the shareholders, from laying down the rails, till the validity of the contract had been decided upon at law.³ So the New York State comptroller, being about to sell the Hudson and Berkshire Railroad, to the prejudice of those holding bonds, under the act of 1847, was enjoined from so doing.⁴ So an injunction lies, against an attachment, by judgment creditors of a railroad, of its revenues pledged for the payment of outstanding bonds.⁵ But, in another case, though the acts of the directors of a railway company appeared to have been improper, the court would not restrain the company from enforcing the payment of calls, as it was possible that there were legal obligations to answer; and an injunction was refused, but without costs.⁶ Nor will an injunction be granted to a stockholder, merely because the construction of authorized branches will diminish his dividends, or the means of the company.⁷ So, where the subscription to a railroad does not stipulate that the money shall be expended in the county in which the stockholders reside; the company will not be enjoined from collecting subscriptions, on the ground that the road may be extended beyond that county. Such a condition must be clearly and positively alleged, and it must be in writing.⁸

§ 32. There are numerous cases however, of like description, where the process of injunction has been refused. (a)

¹ *Stevens v. Rutland, &c.*, 29 Vt. 545.
See § 29, n.; § 33.

² *Henry v. Great, &c.*, 30 Law T. 10, 141.

³ *Beman v. Rufford*, 6 Eng. Law & Eq. 106.

⁴ *Darby v. Wright*, 3 Blatchf. C. C. 170.

⁵ *Dunham v. Izett*, 15 Iowa, 284.

⁶ *Logan v. Courtown*, 5 Eng. Law & Eq. 171.

⁷ *Newhall v. Chicago, &c.*, 14 Ill

273.

⁸ *Dill v. Wabash, &c.*, 21 Ill. 91.

(a) As to injunction for a *continuous* use and repair of a railroad; see *Blackett v. Bates*, Law Rep. (Eng.) Eq., February, 1866, p. 116.

Thus a statute provided, that one railroad might aid another by subscription to stock or otherwise, upon consent of two thirds of the stockholders present at a special meeting. This provision was reënacted in a subsequent general corporation act, with the further provision that any company might accept the new provisions, and, when a proper certificate of acceptance had been filed, all inconsistent portions of their charter should be repealed. Held, even if the latter repealed the former act (which, it seems, it did not), a stockholder could not maintain a bill to enjoin the fulfilment by the company of contracts for aid, by the indorsement of bonds, the contracts having been unanimously ratified at a special meeting, which amounted to an acceptance, and estopped either party from objecting that no certificate had been filed.¹ So, the Pennsylvania Railroad Company being about to purchase the rolling stock and bonds of the Sunbury and Erie Railroad Company, and to lease it for nine hundred and ninety-nine years, the lessee agreeing to keep the road in repair, maintain its equipment, and pay thirty per cent. of the gross earnings, for taxes, interest on bonds, &c., and the balance, if any, to the lessors; on bill in equity, filed by a stockholder in both companies, for a preliminary injunction against the proposed purchase and lease, it was held, that the intended contracts were valid, because within the corporate power of the two companies, under the acts of Assembly of April 13, 1860, and April 23, 1861, and that they were not assignments in trust for the benefit of creditors, with preferences.² So in Ohio it is held, that, admitting that the legislature is constitutionally incompetent to authorize a railroad company to embark in new enterprises, entirely beyond the scope, and outside of the objects contemplated by its charter, at the time the stock was subscribed for, and thus to effectuate a fundamental change in its charter, without the consent of all its stockholders; it is quite clear that, before a stockholder can have an injunction against such proceedings, he must have shown himself prompt and vigilant in the assertion of his rights, and not wait until the mischief of which he complains is accomplished.³ So, though a share-

¹ *Zabriskie v. Cleveland, &c.*, 23 How. 381.

² *Chapman v. Railroads*, 6 Ohio (N. S.), 119.

³ *Gratz v. Pennsylvania, &c.*, 41 Penn. 447.

holder has an equity to enjoin the directors from applying the funds in the completion of a part only of the line, with a view to the abandonment of the remainder; yet where, with knowledge of the intention to abandon the greater part of the line, he remained passive for eighteen months, while the directors were expending large sums in the completion of the remainder, the court refused to interfere by injunction.¹

§ 32 a. A railroad issued bonds, called "income bonds." "For the punctual payment of the interest and principal of said obligations, and of others of like tenor, issued or to be issued, in preference to the payment of dividends on the capital stock of said company, the income arising from the road and its appurtenances is hereby specifically pledged." The complainants bought some of those bonds of the respondents on March 24, 1855. On March 1, 1855, the company mortgaged their line to the respondents, as trustees, to secure the bonds issued and to be issued, with interest. The complainants filed a bill, to restrain the sale of the mortgage bonds, and alleging that they had an equitable lien upon them, and a priority over the holders. The answers denied the material allegations of the bill. It did not appear that the complainants were induced to buy the income bonds under any other considerations than those terms stated on the face of them, or that the company had authorized any other representations. Held, upon the coming in of the answers and depositions, the injunction should not be made perpetual; that the issuing of the mortgage bonds was no fraud upon the holders of the income bonds; and the mortgage indicated none other than a legitimate purpose to resort to such means as would promote the ultimate purpose for which the company was created; and that the terms of the income bonds were specific, and the holders must be confined to the preference given thereby.²

§ 33. The rule, that the majority cannot bind the minority in a joint-stock company as to acts not contemplated by the common contract, has not been applied to corporate compa-

¹ *Graham v. Birkenhead, &c.*, 6 Eng. Law & Eq. 132.

² *Garrett v. May*, 19 Md. 177.

nies for a public undertaking, involving public interests and duties under the sanction of Parliament. Thus two shareholders in a railway, suing in behalf of themselves and all others, sought to restrain the company from applying their funds in completing a branch railway, for the construction of which their parliamentary powers had expired. An interlocutory application for an injunction was refused, on the grounds, that one of the plaintiffs named had acquiesced in the acts complained of; that the injunction would cause considerable inconvenience; that, as all the land had been purchased, it was not clear that it was illegal to complete the line; and that the suit was not properly framed, being on behalf of all the shareholders, which would include those who had sanctioned the acts.¹ So a company was authorized by three acts of Parliament to make three distinct railways (not forming one line), with separate amount of capital for each. Another company was, by a fourth act of Parliament, authorized to take a lease of the three lines, and did so, and the whole undertaking was placed under the control of a joint committee of directors of all the companies. One of the three lines was sufficiently completed to be, and was, opened, and the directors made calls for the purpose of entirely finishing the opened line, the other two being abandoned. An injunction was granted at the Rolls, restraining the application of money and the making of calls for any purpose not authorized by the three acts, excepting only for ordinary repair. Held, on appeal, that, on an interlocutory application, in the absence of the lessee company, the opened line being worked under the direction of the joint committee, the injunction must be dissolved.²

§ 34. When the fundamental contract between two railroads provides that all disputes shall be settled by arbitration, and road A has illegally misapplied funds or profits of both, with the assent of a majority of road B; if dissenting stockholders in B bring a bill in equity for their share of such profits, the court will enjoin both roads, if necessary, from

¹ *Ffooks v. London, &c.*, 19 Eng. Law & Eq. 7. See § 31.

² *Hodgson v. Powis*, 8 Eng. Law & Eq. 257.

settling or attempting to settle the claims of the complainants by arbitration.¹

§ 35. Where there were two sets of railroad bondholders, secured by separate mortgages, one of the second set was enjoined from collecting his bond by execution, the property being insufficient for all; upon the ground that such sale would interfere with the priority of the other set, and the *pro rata* rights of the other members of the second set.²

§ 36. In a case of difficulty between a railroad company and a contractor employed in constructing the road, the company claiming that the contract had been violated by him, and a right to discharge him, and collisions occurring between the workmen of the respective parties, and the work being thereby delayed; an injunction was granted against him, forbidding his continuance on the line, and directing an account of what was due him, all questions being reserved for a trial at law.³

§ 37. The insolvency of a railroad is no ground of injunction against the collection of subscriptions.⁴ But where there are sundry *fi. fas.* against an insolvent railroad, threatening to seize and sell the road, with its equipments, extending one hundred miles in length, through six different counties; equity will take jurisdiction, direct a sale of the entire property for the benefit of all concerned, and distribute the fund according to the practice and usage in chancery, in a creditors' suit against executors and administrators. In such a case, no other court possesses adequate jurisdiction to reach and dispose of the entire merits. Any creditor who has a claim upon the fund, but who is not a nominal party to the suit, may make himself a party thereto in fact, by coming in and presenting his claim under the decree, and submitting himself to the jurisdiction of the court for its settlement and adjustment upon the fund to be distributed. If he neglects or refuses to

¹ *March v. Eastern Railroad*, 43 N. H. 515.

² *Pennock v. Coe*, 23 How. 117.

³ *The East, &c. v. Hattersley*, 8 Hare, 72.

⁴ *Dill v. Wabash, &c.*, 21 Ill. 91.

come in and entitle himself to the benefit of the decree, equity will not assist him to set aside and annul it.¹

§ 38. There have been some cases of injunction, relating to *canals*.

§ 39. A society, incorporated in 1791, located at the Falls of the Passaic, pulled down a gate and waste-way of the canal of the Morris Canal Co., incorporated in 1824, and discharged the water from the canal into the Passaic, above the falls. The canal company repaired the breach, and filed their bill against the society for an injunction, which was granted. The society filed a cross bill, setting up an agreement, stating breaches thereof, and praying a decree for a specific performance thereof. A demurrer to the bill was overruled.²

§ 40. By an act of the Legislature of Illinois, passed July 21, 1837, the canal commissioners were authorized to enlarge the natural basin at the junction of the north and south branches of the Chicago River. And, in order to do this, block No. 7, of canal lots in the city of Chicago, was to be reserved for sale, so as to exchange it for block No. 14, which would be removed in the enlargement of the basin. Both blocks were to be appraised at the same time, and the owners of block 14 were to take block 7 at its appraised value. In 1843, an act was passed, granting the canal property to trustees, who were required to complete the canal, and afterwards to sell all lands, lots, and water-power granted to them by the act. In 1845 another act was passed, requiring the trustees to proceed forthwith in perfecting the exchange of block No. 14 for block No. 7, as contemplated by the act of 1837. The trustees refused to make the exchange, and advertised block No. 7 for sale; and the owners of block No. 14 filed a bill in chancery against them, to enjoin them from selling, and to compel them to exchange. Held, there was no principle in equity jurisprudence upon which the bill could be sustained; that the complainants had no present interest in block 7, and

¹ Macon, &c. v. Parker, 9 Geo. 377. &c., 2 Halst. Ch. 252; 1 Halst. Ch.

² The Society, &c. v. The Morris, 203.

no right to call upon a court of equity to interfere and prevent the sale, and that, if the trustees had violated their duties, the State alone could complain.¹

§ 40 a. In 1794, the plaintiffs were empowered by statute to construct and maintain a canal, with a provision that "it should be lawful for the owners of lands within the distance of twenty yards from the canal, to take water from the canal for the sole purpose of condensing the steam used in working any engine, but for no other purpose." The defendants owned two mills, one of which was begun in 1829, and, while erecting, A, the party then owning the property, applied for permission to lay pipes from the canal to his engine-house, to convey water for steam and injection. No condition was imposed, that the water should be used only for condensing, and A, with the knowledge of the company, and under superintendence of their engineer, laid pipes for both the above-named purposes. After several years, an action was brought by the plaintiffs against the mill-owners, for getting water for other purposes than condensing, and damages recovered; and they now file a bill for a perpetual injunction. Held, they were estopped by acquiescence from thus restricting the defendant's rights, but an injunction was granted to restrain the defendants from using the water to make saw or size, and for cleaning the boilers.²

§ 40 b. A canal act reserved the mines and minerals, within and under the land through which the canal passed, to the owners, who were also empowered, subject to certain restrictions, to work and get the mines, &c., without injury to the navigation or the works. They were also prohibited from getting minerals under or within ten yards from the canal, without consent of the proprietors, who were to pay a certain compensation for such prohibition. Held, these provisions impliedly embraced workings more than ten yards from the canal, and the proprietors could not, under their common law

¹ Canal, &c. v. Dewes, 11 Ill. 592.

² Rochdale, &c. v. King, 21 Eng. Law & Eq. 177.

right to adjacent support, prevent the lessee of an adjacent quarry, claiming under the vendor of the land over which the canal was made, from working more than ten yards from the canal which was thereby endangered, without paying the compensation above referred to; but might do so, upon such payment. Held, further, that the reservation included everything below the surface, available for agricultural purposes, which could be in any way useful, and also the right of quarrying.¹

§ 41. In the present connection, it seems proper to refer to one of the most important cases of application for injunction, which have ever arisen in the United States, turning upon the conflicting claims of two *bridge corporations*. (a) In this case, the nature of the franchise created by a corporate charter for purposes of public travel, as being on the one hand an exclusive privilege, and on the other open to legislative modification and control by a subsequent rival charter, is very learnedly and elaborately discussed both in a State and in the United States courts, and with equal ability, and nearly equal weight of authority, on both sides of the question. It will be seen that the same case involves a view of the franchise of a *public ferry*.

§ 42. By an ancient ordinance, dated 1636, 1640, and 1642, the government of the Colony of Massachusetts, having previously established a ferry, between Boston and Charlestown, over Charles River, recite that they have given the *revenue* of the ferry to Harvard College. In 1640, the *ferry* was given to the college, being then leased. In May, 1650, the college was incorporated. In October, 1650, the college having petitioned, in regard to *rectifying the ferry rent*, which belongs to the college, it was ordered that the president, for the college, might lease or otherwise dispose of the ferry. In 1654, an act, imposing a tax for the benefit of the college, spoke of the profit of the ferry, formerly granted. From 1639 to 1785 the college received the profits; since 1650, sometimes managing the ferry themselves, and some-

¹ *Midland, &c. v. Checkley*, Law Rep. (Eng.) Eq. 19.

(a) See Appendix — New Jersey.

times leasing it. The college fixed the tolls, but the legislature passed various acts regulating the ferry, and sometimes affecting the tolls. The college was in some instances consulted, in others, not. In 1784, a statute incorporated certain persons, for the purpose of building a bridge in the place where the ferry between Boston and Charlestown is now kept; and authorized them to receive toll for forty years, and double toll on Sunday; they paying the college £200 per annum, which they accordingly paid; the bridge at the end of the time to revert to the State, saving to the college a fair annual compensation for the loss of the ferry. In 1792 an act established the West Boston Bridge Corporation, to build a bridge across the same river from Boston to Cambridge, the legislature having previously resolved that the act of 1784 was not the grant of an exclusive right to build over these waters. The act of 1792 authorized a toll for forty years, required payment of an annuity to the college, and, in consideration of the risk and importance of the work of building the Charles River bridge, and the loss which the plaintiffs would suffer from the new bridge, extended their charter for thirty years, with the exception that the additional toll on Sunday should be relinquished. In 1828, the defendants were incorporated to build another bridge across the river, between Boston and Charlestown, distant from the former, in Charlestown two hundred and sixty feet, and in Boston nine hundred and fifteen feet. The plaintiffs thereby lost two thirds of their former tolls. A bill in equity for an injunction, brought in the Supreme Court of Massachusetts, was dismissed, the four judges being equally divided in opinion; and in the Supreme Court of the United States the judgment was affirmed, three judges dissenting.¹

§ 42 a. Equity will grant a perpetual injunction, to restrain the owner of a private bridge from permitting travellers, etc., subject to the payment of toll at an established bridge, to pass over his bridge, in violation of the rights of the proprietor of the latter, and decree a pecuniary recompense for the losses thereby sustained.²

¹ *Charles, &c. v. Warren, &c.*, 7 Pick. 344; 11 Pet. 420.

² *Harrell v. Ellsworth*, 17 Ala. 576.

§ 43. Application for injunction by the Mohawk Bridge Company against the Utica, &c., Railroad Company, to restrain the erection of a bridge over the Mohawk River. The plaintiffs owned a toll-bridge across the river, about one hundred rods above the defendants' proposed bridge; and their bill alleged, that the latter would be a damage to them, by diversion of travel from their bridge, and interfere with their chartered exclusive privilege. The plaintiffs' charter prohibited any *ferry* within a certain distance from the bridge. It was held that the plaintiffs' charter, being in derogation of public rights, must be construed strictly, and the injunction was refused.¹

§ 43 a. After a decree of the Supreme Court, declaring the bridge over the Ohio, at Wheeling, a nuisance, Congress passed a law making it a lawful structure. The bridge was subsequently blown down, and an injunction granted against rebuilding it was disregarded. A majority of the court refused an attachment for contempt, though the act was considered unconstitutional and void; no decision to that effect having been made.²

§ 43 b. Under the (Cal.) act of 1850, the plaintiffs obtained from the Court of Sessions power to construct a toll-bridge at a certain point; constructed it accordingly; and were still maintaining it; when the legislature granted to other persons a franchise to construct a new bridge within six hundred feet of it, impairing its value and the amount of profit. Held, the plaintiffs could obtain no injunction to prevent the completion and use of the new bridge.³

§ 43 c. A bridge company, setting up exclusive rights within certain limits, cannot have an injunction upon the building of a bridge within those limits, when the answer shows, that the complainants' bridge has been so far appropriated to

¹ Mohawk, &c. v. Utica, &c., 6 Paige, 554. See Richmond, &c. v. Louisa, &c., 13 How. 71; Piscataqua, &c. v. New Hampshire, &c., 7 N. H. 59; Newburgh, &c. v. Miller, 5 John Ch. 101; Nichols v. Gates, 1 Conn. 318; Chesapeake, &c. v. Baltimore, &c., 4 Gill & J. 1.
² Pennsylvania v. Wheeling, &c., 18 How. 421.
³ Fall v. Sutter, 21 Cal. 237.

the use of a railroad, as to render it inconvenient and dangerous for ordinary travel.¹

§ 43 d. A bill, to enjoin the change of a terminus of a bridge, alleged, that the plaintiff owned about twenty-five acres of land near its termination, bounding on the highway which led to it; also a wharf on the river, a boarding-house, and other improvements on streets connected with such highway. Held, the bill set forth no peculiar injury, and therefore could not be maintained.²

§ 44. The principle has been applied to a *ferry*, with the right of tolls, that an exclusive legal right ought to be protected, not only by redress for the past, but, in equity, against violations of hourly repetition and interminable duration. Hence equity will sustain a bill for an injunction, where the owner of a public ferry loses part of his rightful profits, by means of a ferry established near his, without right, but cannot procure proof to enforce his claim at law.³ The right of holding a ferry, with the privilege of taking tolls, is a franchise which the chancellor will protect, not only by redress for the past, but by restraining repeated disturbance; more especially will equity interfere, if the right has been established by judicial action.⁴ Thus, in a leading case relating to ferries, a grantor by deed conveyed his exclusive right to navigate with steamboats from the city of New York to *Elizabethtown Point*. The defendant, to a bill for injunction brought by the grantee, answered, that he navigated between New York and *Halsted's Point*, which was within the township of Elizabethtown, but separated from Elizabethtown Point by a large and navigable creek, and that his wharf is near Elizabethtown Point. Upon the grounds, that the grant was intended to comprehend the entire benefit of all the travelling and passengers going to and from Elizabethtown and New York; that Elizabethtown Point was used for the landing-place of the town; and that all contiguous and injurious com-

¹ *President, &c. v. Trenton, &c.*, 2 Beasl. 46. 256; *M'Roberts v. Washburne*, 10 Min. 23; 16 B. Mon. 699.

² *Allen v. Board, &c.*, 2 Beasl. 68.

⁴ *Newport v. Taylor*, 16 B. Mon.

³ *Long v. Beard*, N. C. Term R. 699.

petition was to be excluded: judgment was given for the plaintiff.¹

§ 44 a. A, the owner of a ferry, obtained an act of Parliament enabling him to build a toll-bridge, — any person who should evade the tolls, by otherwise conveying or helping convey passengers within the limits of the ferry, to forfeit and pay a penalty, to be summarily recovered before a justice, and levied under a warrant from him; one moiety to the informer, the other to A; in case there were no sufficient distress, to be committed; allowing an appeal to the Quarter Sessions, but forbidding a *certiorari* or other process to any court of record at Westminster. On a motion to restrain the defendants, a railroad, having its terminus within the limits of the ferry, from transporting passengers over the river in steamboats; held, though the act gave A no action against persons evading the tolls, yet he might have an injunction, if entitled to penalties *de die in diem*. And, as no action would lie against the defendants, the court would not leave him to a distress, followed by replevin, but would direct an issue to try the right, and forbid any objection on the ground that the defendants were a corporation.²

§ 44 b. Where a ferry license or charter is not in terms exclusive, no such privilege will be inferred. A license, extending from one point to another, on a river, but not in terms exclusive, does not entitle the licensee to an injunction against parties who in skiffs, &c., carry persons across the river for hire, between those points.³

§ 44 c. To be entitled to an injunction for continuous encroachments upon a ferry franchise as a private nuisance, the applicant must have perfected his right to the franchise, by performing all conditions precedent to its exercise devolving upon him by the act granting it, and must be prepared to furnish the facilities designed to be secured by it. Where the

¹ Ogden v. Gibbons, 4 John. Ch. 150.

² Cory v. Yarmouth, &c., 3 Hare (25 Eng. Cha.), 593

³ McEwen v. Taylor, 4 Greene, 532.

act provides for the filing of a bond, with a tribunal named, and that, until such tribunal is organized, he may proceed by filing the bond with another person; *it seems*, that this is equivalent to an express declaration that he shall not proceed, nor have any rights under the act, till the bond is filed. In such a case, to enjoin encroachments upon the franchise, the filing must be proved.¹

§ 44 d. A bill in chancery set forth, that the plaintiff is owner in fee of both landings of a ferry, describing it; that the legislature of the territory, by statute passed in 1855, granted him the exclusive right to keep a public ferry at said point, for a stated number of years, with the right of landing extending for a distance specified; that he gave a bond, duly approved, as in said statute required; and that the defendant claims and exercises the right of ferrying within said limits, and receives pay therefor, and is constantly interrupting the plaintiff's rights. Held, that, without the alleged franchise, the acts complained of in the bill would be mere acts of trespass upon the real estate of the plaintiff, whereby no such danger of irreparable injury appears, as to require an injunction.²

§ 45. Where, in a bill to enjoin the usurpation of the complainant's right to a ferry, he describes himself as lessee from certain commissioners, a body corporate to whom the ferry was granted; he must prove their corporate character and the lease, if these facts are put in issue by the answer.³

§ 46. A being the owner of a ferry, and having opened a private way leading from it into the public road on one side of a river, B, who owned a ferry near A's, placed an obstruction on the road. A filed a bill to have it abated, &c. It appearing from the answer of B, that A had been resorting to unfair means, on the other side of the river, to divert the travel from B's ferry; held, the injunction ought to be dissolved.⁴

¹ Walker v. Armstrong, 2 Kansas, 198. ³ Carter v. Garrett, 13 Ala. 728.

² *Ib.*

⁴ Hill v. Averett, 27 Ala. 484.

§ 47. A statute empowered the Watermen's Company to appoint watermen to ply on Sundays, within certain limits, from such common stairs or places of plying on the Thames, as might be appointed — if any other person should thus ply, a penalty of 40s. for each offence. The act also provided for the leasing of the Sunday right at plying places, and that the profits or rent should go to aged and sick watermen. The plaintiff, a lessee of the company of the right to ply from certain stairs to a certain point across the river, under claim of a right of ferry, brings a bill to restrain a new ferry established fifteen yards from his. Held, although in general a party might in a case of this nature have an injunction, notwithstanding the statutory penalties, and though the proximity of the two ferries justified this remedy; yet, as the plaintiff's privilege was confined to Sundays, and he was under no obligation to maintain the ferry, he could not make the same claim as in case of an ancient ferry; and the bill was dismissed, with costs. Sir R. T. Kindersley, V. C., remarks: "A right of ferry is an exclusive right or monopoly, and, as such, it is in itself an evil, being in derogation of common right. But as a compensation — there is this great advantage to the public, that they have at all times at hand, by reason of the ferry, the means of travelling on the king's highway, of which the ferry forms a part, for the owner of the ferry is under the obligation of always providing proper boats, with competent boatmen, and all other things necessary for the maintenance of the ferry. The right conferred on the plaintiff — differs very materially from that which exists in the case of a ferry. — The right — is extremely limited. It applies only to Sundays; and though it is perhaps possible to conceive such a thing as a Sunday ferry, giving the right to convey the inhabitants of a parish to their parish church — there is nothing of the kind here. In the next place, the right — is a simple monopoly, without any compensation to the public. — The plaintiff may, whenever he thinks fit, abandon Garden Stairs, &c. The term ferry is used in one of the sections of the act, but — the language — is very inaccurate. — The act must be construed strictly. — In the case of a ferry, properly so called, courts — protect the owner of a

ferry upon this principle ; that — it is for the public benefit that the rights of the owner of the ferry should be secured to him ; but in the present case that is not so. The public have no interest in the profits of this Sunday ferry — being secured to the Watermen's Company. It is true that those profits are dedicated to a charity ; — but that is not such a public benefit as this court — would protect.”¹

¹ *Setton v. Gooden*, Law Rep. (Eng.) Eq., June, 1866, p. 122.

CHAPTER XXVII.

EASEMENTS.

- 1. General remarks.
- 1 a. Light, &c.
- 4. Party-walls.
- 4 c. Dedication.
- 6. Common.
- 7. Watercourses.
- 13. Mills.
- 18. Dams.
- 22. Fishery.
- 25. Ways.
- 30 a. Wharves, levees &c.

§ 1. THE remedy of injunction is often invoked in reference to other rights than those considered in the last chapter, belonging to the general class of *easements*. But where a corporation, authorized by law to construct a public improvement, in passing over the land of A interferes with an easement of B in the land; B cannot maintain a bill against A to compel a restoration of the easement; more especially without making the corporation a party. The court say, it "is an attempt to make an individual in no wise connected with the company restore that which they have taken without question of their right. No argument can support such a claim, and none is needed to answer it. The statement of the claim is the best possible refutation of it."¹

§ 1 a. *Lights* constitute an easement, for the protection of which parties often apply for an injunction. (a)

¹ Per Woodward, J., *Mulvany v. Kennedy*, 26 Penn. 44, 45.

(a) For a case, containing an elaborate discussion and a very full citation of authorities, upon the privileges of light and air, as derived from *dedication*, or a conveyance from one who subsequently conveys the adjoining vacant land upon which the obstruction complained of is erected; see *Morrison v. Marquardt*, Law Reg., April, 1868, p. 336—Iowa.

§ 1 b. It is held that there cannot be a perpetual injunction in regard to lights, in case of a disputed title, until the question has been settled at law.¹ An injunction cannot be had against the erection of a building which merely obstructs the view of the plaintiff's place of business.² Nor an interlocutory injunction, for a small excess, in the height of a building already erected, above the provisions of a contract or statute, unless it cause irreparable injury.³

§ 1 c. In a late English case the rule is adopted, that ordinarily the erection of a building will not be enjoined, where its distance from the light alleged to be obstructed equals the height of the building. The *metropolitan building act* is said to be framed on that principle. And the converse of the rule is also adopted.⁴

§ 1 d. A, the owner of a house, purchased from B a strip of land adjoining his lot, for the purpose of keeping it open and free from buildings. B erected a house on the line of this strip, and opened windows overlooking it, whereupon A placed blinds upon his land close upon the windows, so as to entirely obstruct the view from them. He also erected buildings on the strip of land in the rear of both houses; and B filed his bill to compel him to remove such buildings and blinds, setting forth that, by the contract of sale, A was restricted from building upon the land between the houses, and obstructing the light of the vendor, but that such restriction was omitted from the deed to A by mistake. It appeared that A agreed, as part of the consideration of the purchase, not to build upon the strip; but not that the privilege of light was reserved to his vendor. Held, though the proof showed an agreement not to build upon any portion of the land, the allegation in the bill covered only the portion between the two houses, and B could obtain relief only as to that portion. A was accordingly enjoined from erecting any building upon the part between the houses, but was not required to remove his

¹ *Irvin v. Dixon*, 9 How. 10.

² *Butt v. Imperial, &c.*, Law Rep. (Eng.) Eq., March, 1867, p. 157.

³ *The Warden, &c. v. S. E., &c.*, 9 Hare (41 Eng. Cha.), 492.

⁴ *Beadel v. Perry*, Law Rep. (Eng.) Eq., April, 1867, p. 463.

buildings in the rear, nor the blinds placed before his vendor's windows.¹

§ 1 e. The question is sometimes raised, as to the propriety of a *mandatory* injunction. In a bill for a mandatory injunction, to compel the lowering of new buildings, alleged to obstruct the plaintiff's light and air, to the height of the former ones; it appeared that the plaintiff, having heard of the proposed erection in April, did not complain till the following November, during which time the defendants made large expenditures; and also that the plaintiff, since the filing of the bill, offered to take a pecuniary compensation. Held, although a proper case for the injunction prayed for; yet, under the circumstances, there should be an inquiry of damages instead of an injunction. Sir W. Page Wood, V. C., remarked: "It is only in very exceptional cases indeed, that defendants, who have erected buildings of this description — will be considered as entitled, as it were, to a compulsory sale of a plaintiff's property without any act analogous to the lands clauses consolidation act, under which damages can be properly ascertained by means of a jury, and thus become purchasers of property to which otherwise they would have no right. In two cases only (one heard by Lord Westbury, of *Izenberg v. East India, &c.*;² the other decided by Vice-Chancellor Kindersley, the *Curriers' Company v. Corkett*,³) have damages been given instead of relief by way of injunction." For the reasons above stated, however, the remedy of damages was in this case adopted.⁴

§ 1 f. Where about one half of the plaintiff's sky area was shut out by the building complained of; and he was thereby obliged to remove his workmen to another part of his building: held, he was entitled to an injunction; but, a part of the defendant's building having been erected, and no mandatory injunction prayed, the court ordered an inquiry of damages.⁵

¹ *Athey v. McHenry*, 6 B. Mon. 50.

² 33 L. J. Ch. 392; 10 Jur. N. S. 221; 12 W. R. 450.

³ 2 Dr. & Sm. 355.

⁴ *Senior v. Pawson*, Law Rep. (Eng.) Eq., March, 1867, pp. 330, 333.

⁵ *Martin v. Headon*, Law Rep. (Eng.) Eq.; August, 1866, p. 423.

§ 1 g. A mandatory injunction may be granted on motion, where, pending the bill, the defendant continues the erection of the building, alleged to obstruct the plaintiff's lights. Sir John Stuart, V. C., remarks, with reference to injunctions of this nature: "Reference has been made to a supposed rule of the court, that mandatory injunctions cannot properly be made except at the hearing of the cause. I never heard of such a rule. Lord Cottenham was, so far as I know, the first judge who proceeded by way of mandatory injunction, and he took great care to see that the party applying was entitled to relief in that shape. — The right in these cases is legal, and the protection sought is of that legal right, and this court ought not to go beyond it."¹

§ 1 h. A late English case² contains an elaborate review of the cases upon *country and city light*. It is remarked: "Obstruction of light rarely occurs in the country; towns are the places where light is wanted. The Romans, who were very accurate in their classification of this subject, divided servitudes into 'rural' and 'town' servitudes; and appropriated to the division of town servitudes the case of *non altius tollendi*, which was considered to be a servitude which would be most likely to occur in a town residence; rarely, if ever, in the country."³ And in a later case the following remarks are made by Sir R. T. Kindersley, V. C., with regard to a distinction sometimes supposed to exist between city and country, in reference to the easements of light and air: "The first case — is *Clarke v. Clark*, decided by the Lord Chancellor in November last.⁴ His Lordship — used expressions calculated to produce, and which, in fact, did produce, the impression that he was of opinion that where the light and air coming to ancient windows in a house in any large town will be obstructed by buildings about to be erected, the owner of such ancient lights must — make out a greater degree of damnification than — if his house had been situated in the country. — In —

¹ *Beadel v. Perry*, Law Rep. (Eng.) Eq., April, 1867, p. 466. Rep. (Eng.) Eq., July, 1866, p. 248. See also *Clarke v. Clark*, Law Rep.

² *Dent v. Auction, &c.*, Law Rep., July, 1866, p. 238. (Eng.) Eq., January, 1866, p. 15.

⁴ Law Rep., 1 Ch. 16.

³ Per Sir W. Page Wood, V. C., Law

Durell *v.* Pritchard,¹ in December, 1865, and Robson *v.* Whittingham,² in January, 1866, before the Lords Justices, the Lordships grounded their decisions on that view. In March, 1866, the case of Yates *v.* Zack³ was decided by the Lord Chancellor, and immediately afterwards the Vice-Chancellor Wood gave his judgment in Dent *v.* The Auction Mart Company.⁴ The vice-chancellor carefully examined the four prior cases.—and the view which he took of them was, that Clarke *v.* Clark had first suggested the distinction—and that the two cases before the Lords Justices had proceeded on the supposition that—such distinction had been established by Clarke *v.* Clark; but his Honor was of opinion that in Yates *v.* Zack the Lord Chancellor, though not in express terms repudiating that principle, had used such language as amounted to a negation of it; and his Honor came to the conclusion, which I must readily adopt with him, that the apprehension as to the effect of the prior decisions has been removed.”⁵

§ 1 i. With regard to the *amount* of obstruction or inconvenience, which will justify an injunction; the law can hardly be considered as fully settled; or rather each case so much depends upon its own peculiar circumstances, that any rule of general applicability is hardly practicable.⁶

§ 1 j. In a late case it is remarked: “The easement of light, that is, the right which a man has to receive into his ancient window a certain supply of light over or across another man’s land, is just as much part of his property as his land or his house, and is just as much entitled to protection as any other property. It may be, indeed, that the damage done by the neighbor’s act may be so trivial as not to justify the interference of the court. But whenever it is shown that the comfort or enjoyment of a man or his family in the occupation of his house is seriously interfered with, and still more where he is prevented from carrying on his business with the same

¹ Law Rep., 1 Ch. 244.

² *Ib.* 442.

³ *Ib.* 295.

⁴ Law Rep., 2 Eq. 238.

⁵ Martin *v.* Headon, Law Rep. (Eng.) Eq., August, 1866, p. 428.

⁶ See Robson *v.* Whittingham, Law Rep., 1 Ch. 442; Dent *v.* Auction, &c., Law Rep., 2 Eq. 238; Martin *v.* Headon, Law Rep., 2 Eq. 425; Amer. Law Rev., January, 1867, pp. 305–6.

degree of convenience and advantage as theretofore — there is sufficient ground for the interference of this court.”¹ And in a somewhat sarcastic strain, in the case of *Dent v. Auction, &c.*, Vice-Chancellor Wood repudiates the various justifications, which had been or might be set up, of erections operating to diminish the light and air of neighboring buildings. For example, that the plaintiff has as much as others find sufficient for the same purposes; that he might have made his windows larger; that he had damaged his own light by putting up blinds; that the room in question is not suitable for the business carried on, or was secretly used for that purpose; and that the evil might be remedied by *glazed tiles* or a mirror.²

§ 1 k. But other cases hold, that, to justify an injunction for obstruction of light and air, there must be a claim for *substantial* damages.³ So, that appreciable and material damage is necessary, in order to sustain an injunction against the erection of a building on the ground of obstruction to the plaintiff's light. Some diminution of light, in a populous city, is insufficient. As where it was testified by a tenant, that he was obliged to light the gas earlier, but not to what extent; and by an apprentice, that the light was “considerably obstructed.” In such case, no inquiry will be granted as to damages, but the bill will be dismissed, though without prejudice to an action at law.⁴ And in a late case it is remarked: “The old doctrine which was established by Lord Eldon in *The Attorney-General v. Nichol*, seems, in substance, never to have been departed from. The cases before Lord Cottenham are so few as to be scarcely worth mentioning, nor do they call forth any enunciation by him of the principles on which the court acts. But the cases have become much more frequent of late, in consequence of the increased desire to erect in the metropolis and elsewhere, buildings of considerable magnitude, which must, of course, more or less affect houses in their immediate neighborhood. The doctrine — was this: ‘There are many obvious cases of new buildings darkening those opposite to

¹ Per Sir R. T. Kindersley, Law Rep. (Eng.) Eq., August, 1866, p. 433.

² *Ib.* 238.

³ *Dent v. Auction, &c.*, Law Rep. (Eng.) Eq., July, 1866, p. 249.

⁴ *Robson v. Whittingham*, Law Rep. (Eng.) Eq., August, 1866, p. 442.

them, but not in such a degree that an injunction could be maintained, or an action upon the case, which, however, might be maintained in many cases which would not support an injunction.' " ¹

§ 1 l. A applied for an injunction to restrain B from the erection of his building, setting up in his bill an agreement that B was to sell A that part of his lot lying in the rear of his own lot, that A might enjoy light and air over the same. The injunction was granted, and afterwards, on B's motion on filing his answer, was dissolved. At the argument of this motion, B's counsel, in explaining a diagram of the premises, said that B's building did not cover the entire rear of A's lot, and, if A would take down his privy, he could enjoy light and air. A did take down the privy, and put into the rear of his other buildings a range of fire-proof windows. B thereupon began the erection of a dead wall along the site of the privy. A applied for an injunction, restraining such erection. Held, the declaration of B's counsel, *in facie curiæ*, followed by A's acts, constituted a contract with the court and with A, which estopped B from denying the same and acting in denial of A's rights, founded on that declaration; and an injunction was issued restraining the erection of the dead wall.²

§ 2. A, who owned a lot of land with buildings thereon, obtained a temporary injunction on filing his bill therefor, restraining B, the owner of an adjacent lot, from erecting a certain building on his lot. This injunction was dissolved on motion, on filing B's answer. B proceeded with his building and also with a dead wall across the rear of A's lot, which was not contemplated when the injunction was dissolved. A moved for an injunction restraining the erection of the dead wall, and filed affidavits in support of his motion, showing new matter since the filing of the bill; and B also filed in reply new affidavits. Held, that the decision dissolving the injunc-

¹ Per Sir W. Page Wood, Law Rep. (Eng.) Eq., July, 1866, p. 243; 16 Ves. 343.

² Banks v. American, &c., 4 Sandf. Ch. 438.

tion was conclusive between the same parties on the same state of facts, or on a new state of facts, without leave to apply anew for a revival of the injunction which was dismissed; but that the judge at the final hearing was not concluded from granting a perpetual injunction or any other relief sought for, an order made on a motion not being *res adjudicata*, nor concluding the court on points of law; and, as the case on the second motion showed that A was entitled to an injunction, it was granted.¹

§ 2 a. The plaintiff leased to the defendant, for eleven years, a warehouse bounded on vacant land of A, “excepting and reserving unto (the plaintiff) the right to stop up and build against the five windows in said warehouse, which front upon” A’s land, “and also to build against and put timbers into the wall, on the side of said warehouse in which the said five windows are, at his pleasure.” The defendant afterwards took a lease from A of the vacant land for fifteen years, terminable by himself in ten years, and proceeded to erect a building thereon, in contact with the wall of the warehouse containing the windows. Injunction refused, upon the grounds of a doubtful right; that the injury was trivial, or easily compensated in damages; that the plaintiff was a mere reversioner, having demised the warehouse to the defendant for a long term; and further, that an injunction would be an ineffectual remedy, without a decree compelling a conveyance from A. of the adjacent lot; and that an express statute afforded the plaintiff a simple and economical remedy, for preventing the alleged encroachment from ripening into a right by adverse use.²

§ 3. In an action for obstructing ancient lights, with a count for an injunction under the 17 & 18 Vict. c. 125, § 79, after a verdict had passed for the plaintiff, the court granted an injunction, under § 82 of that statute, to restrain the defendants from continuing the wrongful acts complained of in the action, and from committing any injury of

¹ *Banks v. American, &c.*, 4 Sandf. Ch. 438.

² *Atkins v. Chilson*, 7 Met. 398.

the kind, relating to the rights and property of the plaintiff, mentioned in the declaration, and from erecting, keeping erected, and continuing the erection of so much of the wall and buildings as was opposite a certain messuage and premises of the plaintiff mentioned and described in the declaration, and known, &c., so or in such manner as to darken or obstruct any of the ancient lights or windows of the said messuage and premises, and from erecting any other building, and doing any other act whereby the light and air coming to and entering his messuage and premises by means of the said windows might be obstructed, or such messuage and premises might be in any way darkened, and from the repetition or continuance of any act whereby an injury of a like kind might happen to the plaintiff; the writ of injunction to lie in the office till next term, the defendants undertaking to pull down as much of the wall and building as should be sufficient to restore to the plaintiff the full enjoyment of the light and air he had previously, and to do the same to the satisfaction of a surveyor to be agreed on or nominated by one of the judges of the court, the defendants to pay the costs of the rule and of the surveyor.¹

§ 4. *Party-walls* are another easement, which may be protected by injunction.

§ 4 a. The owner of one half of an ancient solid party-wall, long used for the support of buildings erected on each side of it, may be restrained by injunction from cutting away a portion of its face, and erecting a new wall upon his own land, two inches distant from the portion of the old wall which is left standing, and connected with it by occasional projecting bricks and ties.²

¹ *Jessel v. Chaplin*, 37 Eng. Law & Eq. 472.

² *Phillips v. Boardman*, 4 Allen, 147.* See *Zugenbhuler v. Gilliam*, 3 Clarke, 391.

* An earlier, informal report of this case states it as follows: The parties to a bill for an injunction were owners of adjoining estates in Boston, between which was an ancient party-wall, one foot thick, used by them in common for support of the timbers of their respective buildings. The defendant, having taken down his building, and being about to erect a new one, had pared off to a considerable height the face of the wall, on his side of it, to the depth of four

§ 4 b. Equity will not restrain a person from making a reasonable improvement on his own land, upon the ground that he thereby necessarily endangers an adjoining edifice, unless the owner of the latter has special privileges which are thereby violated; derived from the party making the erection, or those under whom he claims, either by prescription or by grant. Thus the defendant, owning a lot within six feet of Christ's Church, in New York, built more than thirty-eight years before, commenced the erection of a building thereupon, to be six stories high; and was sinking the foundation sixteen feet deep, and ten feet lower than that of the church. The wall of the church, at the corner opposite to which the excavation had been completed, had so settled as to leave a considerable crack. The proprietors of the church filed a bill for injunction, stating these facts, and that the church was in great danger if the work should proceed; but not that the defendant was improving his property in an unreasonable or unusual manner, or with any intention to injure the church, or that the plaintiffs had any claim by prescription, or grant from the defendant. Upon application to dissolve the injunction, which had been granted; it was accord-

inches, and was erecting a new wall, a foot thick, occupying the four inches of the old wall thus removed, and eight inches taken from his own land. In the course of this work, which had reached to the floor of the second story, when an injunction was granted, he had occasionally projected a brick, two inches beyond the face of his new work, so as to reach the centre of the old wall; partly for support to the remainder, but chiefly to denote the division line as claimed by him, and with the avowed purpose of breaking up the joint character of the old wall, and preventing the plaintiffs from building close to the face of his new wall, if, upon rebuilding, they should desire to do so. It appeared from the report of a master, that the wall was an ancient one, still sufficient for the buildings which it had divided, and for any buildings such as were commonly erected on that street; that by the paring its capacity for service was materially diminished, and that the new wall was substantially an independent one, affording no material support to the remaining eight inches of the old wall. The injunction restrained the defendant from proceeding to diminish the old wall. Held, upon motion to dissolve the injunction, that, in a case of this nature, neither of the parties could so deal with the wall as to diminish its capacity for service, without consent of the other; and, in addition to the serious and irreparable mischief, and the difficulty of ascertaining its nature and extent after the work should be covered in, the complainants, by twenty years' use of an independent wall, might, without a multiplicity of suits, wholly lose their title. *Phillips v. Boardman*, (cited in) 2 Hilliard on Torts (3d ed.), 12 n.

ingly dissolved.¹ And it is remarked in a late work, that the creation of an easement in this class of cases is “confined to cases where the covenant or agreement on the part of the original grantee with the grantor, expressly related to and was for the benefit of the covenantee as owner of another parcel of estate, and it was so made, that the owner of the granted estate, if not himself the covenantor, had notice thereof when he became the purchaser.”² And the language claimed to establish an easement of this nature will be construed strictly. Thus a vendor covenanted, that no building except tombs should be erected on any part of his land, opposite to the land sold. Subsequently, he sold part of the opposite land, and the purchaser built on it without objection from the former purchaser. Afterwards the vendor sold a further part of the opposite land, and the new purchaser commenced building. The original purchaser filed a bill for an injunction, to restrain the defendant from building on any part of the land of the original vendor or the opposite land. Held, the covenant applied only to the lands of the original vendor, exactly opposite to the lands sold to the plaintiff; and the bill was dismissed.³ (See § 4 a.)

§ 4 c. Another easement is that alleged to grow out of the conveyance or setting apart of real property for certain specified objects, which appropriation is alleged materially to affect the value of adjacent estates.

§ 5. Where, upon a sale of lots in a new town, it was announced that certain pieces were set apart for church lots according to a plan, and a lot was conveyed to a church society by an ordinary deed; held, the lot-owners had no such vested interest in restricting the use of the church lot, as would maintain an injunction against a sale of a portion of it to raise money for building a church on the remainder.⁴ But where certain land within the limits of a city is by statute reserved for the use of the State for a court-house, jail, mar-

¹ *Lasala v. Holbrook*, 4 Paige, 169.

² 2 Washb. R. P. 33. See *Whitney v. Union, &c.*, 23 Law Rep. 405.

³ *Patching v. Dubbins*, 23 Eng. Law & Eq. 609.

⁴ *Chapman v. Gordon*, 29 Geo. 250. See *Maxwell v. East, &c.*, 3 Bosw. 124.

ket, public worship, and burial; the public thereby acquire rights and interests in such land as a common or public square, and, although the legal title may be in the city, it holds subject to the trusts above named, and has no power to sell the land for private purposes. Hence the court will grant a perpetual injunction to restrain and prevent the erection of a private dwelling-house on such square, as an irreparable public injury. The application may be made by the commonwealth, at the instance of the attorney-general.¹

§ 6. The right of *common* has also been made the subject of application for an injunction. Thus, in an old case, a man having granted to J. S. common in his down for one hundred sheep and five rams; the bill complained, that the grantor overstocked the common, so that the plaintiff, the grantee, could have no benefit of the grant, and prayed the grantor might be enjoined not to overstock, &c. Upon debate, the court dismissed the bill.² So an injunction was obtained, on affidavits, against cutting, and pasturing cattle, in a wood, the plaintiff claiming as tenant in fee, or as lord of the manor inclosed under the statute. The defendants denied the former title, and as to the latter claimed common of pasture and estovers, and that after the inclosure sufficient common of pasture would not remain. The plaintiff had previously commenced and been nonsuited in an action of trespass, and entered into an agreement with some of the tenants. The injunction was dissolved upon the answer.³

§ 7. Continuing *diversion of water* from its natural bed is an irreparable injury, which equity will redress.⁴ But, in New York, both by virtue of an express statute, and because the claim is "wholly beneath its dignity," the court will not enjoin a defendant from diverting a stream of water, unless the annual injury to the plaintiff is equal to the interest of \$100, or the immediate injury amounts to \$100.⁵

¹ *Com. v. Rush*, 14 Penn. 186.

² *Fines v. Cobb*, 2 Vern. 116. See *F. N. B.* 125; *Robert, &c.*, 9 Rep. 112.

³ *Hanson v. Gardiner*, 7 Ves. 305 b.

⁴ *Tuolumne Water Co. v. Chapman*, 8 Cal. 392; *Corning v. Troy, &c., Factory*, 39 Barb. 311.

⁵ *Smith v. Adams*, 6 Paige, 435. See

Pratt v. Lamson, 6 Allen, 457; *Binney*, 2 Bland, 117; *Porter v. Witham*, 5 Shepl. 292; *Olmstead v. Loomis*, 6 Barb. 152; *Society, &c. v. Holsman*, 1 Halst. Ch. 126.

§ 8. In a suit to test the question of priority of appropriation of a *mining* stream, a prayer for an injunction to prevent future injury is proper.¹

§ 9. Bill for an injunction, to protect the plaintiff's coal-mines from injury, by the water flowing to them from the colliery of the defendants. Held, an injunction should be granted against working the defendants' mines in any places which might endanger or injure those of the plaintiff, till answer or further order. Upon evidence and a hearing, a perpetual injunction was refused, but the bill ordered to be retained for a year, with liberty to bring an action, the injunction to remain in the mean time.² But upon a verdict found, that the plaintiff was the owner and in possession of land, through which the defendants' ditch was dug, for mining purposes, without the plaintiff's consent, and that the ditch interfered with the comfortable enjoyment of such lot, and injuriously affected it; an abatement of the ditch as a nuisance was ordered.³

§ 9 a. A mine had from before the time of living memory been worked by tin-bounders, according to the custom of Cornwall, by which any one may mark out a piece of waste ground, the owner of which does not choose to work the mines under it, and work them without his consent, yielding him a share of the proceeds. The bounders had also prescriptively used for their works the water of an artificial watercourse arising in the land of another person. The bounders abandoned the mine in 1856, and the owners had since been in possession, and they bring a bill in equity to restrain a diversion of the watercourse by the owner of the land in which it rose. Held (reversing the judgment of the vice-chancellor), that the injunction should be granted, upon the presumption that a right to use the waters had been acquired by arrangement with the owner of the mine as well as with the bounders. The court remark: "The estate or interest of tin-bounders is of an anomalous character. They have a mere chattel — and they

¹ *Marius v. Bicknell*, 10 Cal. 217.

² *Weimer v. Lowery*, 11 Cal. 104.

³ *The Duke, &c. v. Morris*, 6 Hare, 340.

lose their interest, if they cease to work the mine. Their title is not derived from the owner of the land. — The question arises as to what presumption ought to be made as to any easement which they have enjoyed. Ought it to be considered, in the absence of express proof — as a right conceded to them as bounders, or — belonging to the land? — If the former, then it may follow — that when the bounders cease to work — the right which they had acquired — will no longer exist. If, on the other hand, the presumption — is, that the right was one incident to, or conferred on the owners of the land, then the circumstance that it cannot be enjoyed by the same class of persons — leaves the rights of the owner of the soil unaffected. In the case of a stream — flowing in its natural course — this question cannot arise. — The running water — forms part of the land bounded. But the case may be different where the stream is — a watercourse, formed at some unknown time, into which water has been diverted. — The water — appears — to be very important for the due working of the mine. When the workings first began, they, no doubt, were surface workings, and considering how great the necessity was for the water, there is strong reason to think that no bounding would have taken place, if the stream had not then flowed to and over the land bounded. In that case the right must have been a right of the owner and not of the bounder. But — suppose the land to have been bounded without the stream, and that afterwards the stream was brought to the lands by some arrangement made with the then owners. The question is, whether we ought to presume that such a diversion of the stream was made by arrangement with the bounders or with the owner of the land. I strongly incline to the latter presumption.”¹

§ 10. The local board of health, having commenced the construction of a sewer under certain fields, on the banks of the river Avon, belonging to the plaintiffs, who were also entitled to a several *fishery*, and to watering-places for cattle in the river, but were not owners of the water, or of the bed of

¹ *Ivimey v. Stocker*, Law Rep. (Eng.) Eq., July, 1866, p. 396; per *Ld. Cra-worth*, L. C., pp. 403, 405.

the river, the outlet to such sewer being intended to open into the river within the limits of the free fishery ; were restrained by injunction at the suit of the plaintiffs from prosecuting such works.¹

§ 10 a. Upon application for an injunction, to prevent a bleaching company from polluting a stream used for domestic purposes ; the facts, that the defendants were notified, before establishing their mill, that the complainant would permit no pollution of the stream, and that he opposed the incorporation, on the ground that the stream would be injured for his use by their works, and that consequently a proviso was inserted in the charter, forbidding them to injure the water on his land, do not affect the legal rights of the parties ; but they constitute a strong claim for the exercise of the extraordinary power of a court of chancery to prevent the nuisance.²

§ 10 b. An injunction lies, to restrain the members of a highway board — being the local authority for enforcing a nuisances removal act — from allowing any fresh communications with a sewer constructed by their predecessors, which causes a nuisance to the neighboring parish by draining into a stream therein ; although the limitation of their authority prevents any order against them to stop up the sewer and cease draining into the stream.³

§ 10 c. A riparian owner, having a right to discharge foul water into the stream, if he sells land upon the stream, cannot claim a right, unless expressly reserved, to continue to pour refuse into the water in front of the land sold, though the water be not in actual use by the purchaser ; not necessarily because the purchaser owns half the bed, but because every riparian proprietor has a right to use the water, at pleasure, in its natural state, free from such obstructions to the flow, as, if continued twenty years, would become prescriptive rights.⁴

¹ *Oldaker v. Hunt*, 31 Eng. Law & Eq. 503.

² *Holsman v. Boiling, &c.*, 1 M'Cart. 335.

³ *Atty.-Gen. v. Richmond*, Law Rep (Eng.) Eq., July, 1866, p. 305.

⁴ *Crossley v. Lightowler*, Law Rep. (Eng.) Eq., March, 1867, p. 277.

§ 10 d. An injunction lies to restrain the increased and injurious fouling of a stream, notwithstanding a prescriptive right to foul it. So, though the stream is also fouled by others than the defendant. So, in the case of dye-works, not used for twenty years, and suffered to become ruinous, this being a suspension of the right, which proved an intention to abandon it. So, without proving actual injury to the plaintiff. So, although, for the purpose of preventing such fouling, the plaintiff had purchased from some of the defendants, the lessors of the dye-works, land on the stream, without informing them of such purpose; the right of fouling not being expressly reserved.¹

§ 10 e. Commissioners for draining a town may be enjoined from discharging the sewage into a stream which runs through the plaintiff's land and feeds a lake therein, if such sewage injures and has for some years injured the water, and the injury perceptibly increases with the increase in the number of houses which thus discharge their sewage.²

§ 10 f. For many, but less than twenty years, the sewage of a town had been drained, by commissioners acting under a local statute, into a stream passing through land of the plaintiff, without their district, without sensibly polluting it. But, in consequence of the growth of the town for some years previous to this suit, the stream became perceptibly polluted, and the impurity continued to increase. Held, the plaintiff was entitled to an injunction against draining into the stream so as to pollute the water to his injury.³

§ 10 g. The defendant, owning an ancient mill in which paper was made from rags, introduced, instead of or with rags, the Spanish grass, called *esparto*, and carried on the work upon the same scale as before. For more than twenty years before the change, the refuse had been discharged into a stream running by the plaintiff's house. Held, in order to maintain

¹ Crossley v. Lightowler, Law Rep. (Eng.) Eq., July, 1867, p. 478.

² Goldsmid v. Commrs., Law Rep. (Eng.) Eq., February, 1866, p. 160.

³ Goldsmid v. The Tunbridge, &c., Law Rep. (Eng.) Eq., June, 1866, p. 348.

an application for injunction, the plaintiff must prove that the new method was not a reasonable and proper one, or that it had increased the pollution of the stream.¹

§ 11. Equity will protect the drainage of surface water over a lot adjoining the plaintiff's, where such drainage has continued twenty years, by ordering that the channel be cleared out, and enjoining future obstructions.²

§ 12. Equity will not interfere to protect a party claiming the right to flow the land of another, and to maintain a water-course through it, under a parol license, where the evidence is conflicting and inconclusive, and the agreement on which the license is founded is indefinite and uncertain.³

§ 13. With more particular reference to *mills*, it is remarked in various cases, in vindication of the remedy of injunction, as follows: "In regulating the rights of mill-owners and all others in the use of a stream, wherein numbers of persons are interested, equity is able, by one decree, to regulate their respective rights, to fix the time and manner in which water may be drawn, and within what limits it shall or shall not be drawn by all parties respectively; and thus it is peculiarly adapted to the relief sought against such alleged nuisance and disturbance, and affords a more complete and adequate remedy than can be afforded by one or many suits at law."⁴ "The regulation of the use of water upon the different sides of the stream, for hydraulic purposes, is so essential to the manufacturing interests of our community, and in fact to every branch of domestic industry, that it would be deplorable if any of these important establishments could be destroyed by any individual, or combination of persons, and the owners left to seek an uncertain remedy by an action for damages in a court of law."⁵ "If the diversion is a violation of the right of the plaintiffs, and may permanently injure that right, and become,

¹ *Baxendale v. M'Murray*, Law Rep. (Eng.) Eq., December, 1867, p. 789.

² *Earl v. De Hart*, 1 Beasl. 280.

³ *Hazelton v. Putnam*, 3 Chand. 117.

⁴ Per Shaw, C. J., *Ballou v. Hopkinton*, 4 Gray, 328. See *Mitchell v.*

Leavitt, 30 Cow. 587; *Lummeny v. Braddy*, 8 Clarke, 33; *Crittenden v. Field*, 8 Gray, 621; *Sheldon v. Rockwell*, 9 Wis. 166.

⁵ Per Walworth, Chanc., *Arthur v. Case*, 1 Paige, 447.

by lapse of time, the foundation of an adverse right in the defendant, I know of no more fit case for the interposition of a court of equity, by way of injunction. If there be a remedy for the plaintiffs at law for damages, still that remedy is inadequate to prevent and redress the mischief. If there be no such remedy at law, then, *a fortiori*, a court of equity ought to give its aid to vindicate and perpetuate the right of the plaintiffs.”¹ Thus a bill in equity will lie, to enjoin a mill-owner from keeping up his dam and flowing the complainant’s land, during a part of the year fixed by a sheriff’s jury, under (Mass.) Rev. Sts. c. 116, as the time for which such dam should be kept open, after two judgments at law have conclusively established the plaintiff’s right.² So where A conveyed to B, by mutual covenant, a right to a watercourse, to be used for a paper manufactory, but not for any other purpose ; held, B could be restrained from using it for any other purpose.³ So equity will restrain the grantees of part of a mill-privilege from using more water than that granted them, and infringing the rights reserved to the grantor, and which he has enjoyed for many years after the deed, without forcing him first to establish his right by an action at law. Questions of fact may be settled by an issue out of chancery, as well as at law.⁴ So where the plaintiffs had for a long time enjoyed the use of the water in a pond, for propelling their mills, upon which use the value of their mills principally depended ; an injunction was granted, to protect them in the enjoyment of the privilege, without a prior establishment of their right at law.⁵ So equity has jurisdiction of a bill, to restrain the letting off of water from a reservoir established for the benefit of the plaintiff’s mill.⁶ So an injunction lies, for disturbing the use of land for a *mill-yard*.⁷ So where a mill-stream broke the bank, wearing the ground of the defendant, and was making a new channel, with danger of irreparable injury ; the court passed an additional order, before appearance, to restrain the defendant from preventing the plaintiff’s repairing the bank, or entering the defendant’s land for that purpose ; also to restrain the

¹ Per Story, J., *Webb v. Portland, &c.*, 3 Sumn. 189.

² *Hill v. Sayles*, 12 Cush. 454.

³ *Wells v. Chapman*, 13 Barb. 561.

⁴ *Olmsted v. Loomis*, 5 Seld. 423.

⁵ *Belknap v. Trimble*, 3 Paige, 577.

⁶ *Ballou v. Hopkinton*, 4 Gray, 324.

⁷ *Gurney v. Ford*, 2 Allen, 577.

defendant from making any channel in his lands, which would divert the water from the plaintiff's mill, unless cause were shown in six days.¹ So, upon a prayer for an injunction against using the water of a stream otherwise than it had been previously used, it appeared that the defendant sometimes withheld the water, and at others discharged it in such quantities as to endanger the plaintiff's mills. The injunction was granted until a pending suit should be decided ; which decision being in favor of the plaintiff, it was made perpetual.²

§ 13 a. The distinction is made, in a recent case, that, where the rights of several owners in the same water-power or privilege are admitted or have been settled at law, equity will regulate the use of the water, and fix the respective rights. Otherwise, where the object is to settle a disputed title, which may be settled at law.³ But the injunction may be granted upon the ground of long possession, though the right has not been established at law.⁴

§ 14. But in case of a bill in equity, alleging that the plaintiff was lessee of an ancient mill, and that the defendant had erected flood-gates and other works on the stream, which obstructed the mill, and praying for their removal ; on demurrer, it appearing that the works had been erected for more than three years, and nothing done to establish the plaintiff's title at law : held, the bill could not be maintained.⁵ So on application for an injunction, to restrain the defendant from building a new mill for grinding and sawing for the public, on the ground that the construction of the dam would injure the land of the plaintiff and the health of his family ; testimony being heard, the court applied to the case the rule, that it is not every slight or doubtful injury which will justify the use of the extraordinary power of injunction to restrain a man from using his property as his interests may demand, especially as, if the injury apprehended should result, the complainant may resort to law for damages.⁶ So where the

¹ *McSwiney v. Haynes*, 1 Ir. Eq. 322.

² *Robinson v. Byron*, 1 Bro. C. 588.

³ *Bean v. Coleman*, 44 N. H. 539.

⁴ *Bush v. Western*, Prec. Ch. 530 ;
Finch v. Resbridger, 2 Vern. 390.

⁵ *Weller v. Smeaton*, 1 Cox, 102.

⁶ *Wilder v. Strickland*, 2 Jones, Eq. 386.

complainants owned the water-power on one side of a river, and one half of the power on the other, the defendant owning the other half; he having occasionally used more than his share of the water, but no suit having been brought against him therefor, and the complainants having no machinery on that side of the river propelled by water: held, an injunction would not be granted, restraining the defendant in the use of the water.¹ So where an easement in water was granted for the use of machinery then in use; upon a bill to enjoin such use, alleging a change in the machinery, which the answer, on which oath was waived, denied; and no proofs heard: held, the answer met the bill, and was of equal weight, and therefore no case for an injunction.²

§ 14 a. Under an act for draining swamps and bog meadows, in the counties of Orange and Dutchess (New York), it was held that the inspectors, appointed by the court, for draining the great swamp or bog meadow near Newburg, must strictly observe the limits prescribed in the act, and could only continue the main ditch dug for that purpose at the north end of the *great pond*, through lands adjoining the swamp. That they could not dig down the outlet, at the southeast end of the pond, and thus destroy or injure valuable mills, &c., on the outlet, and on land not adjoining the great swamp, or break up ancient and useful streams by draining the natural reservoirs which fed them; and that they should be perpetually enjoined from all proceedings touching the outlet of the pond, and the plaintiffs quieted in the enjoyment of the water for their mills, &c. Chancellor Kent remarked: "The project of draining this little lake, and thereby destroying one mill, and affecting, more or less, all the others which are supplied by its water, is a stretch of power never within the contemplation of the act. It would be an unreasonable and dangerous construction. The power given was supposed to be harmless. It was never intended to touch and materially injure valuable improvements on adjoining lands; much less to break up useful ancient streams, and the natural and

¹ *Norris v. Hill*, 1 Mann. (Mich.) 202.

² *Mandeville v. Comstock*, 9 Mich. 536.

capacious reservoirs which fed them. It is most fit, therefore, that this power should be kept within the words of the act. This is not a case of an ordinary trespass impending, but one great and special, leading to lasting mischief, and to the destruction of the estate, and tending to multiplicity of suits. There is no fact in this case to be ascertained. The whole case turns upon the construction of the act.”¹

§ 15. A bill in equity will not lie, on behalf of a mill-owner, to restrain a riparian proprietor bordering on a pond above, on the same mill-stream, from cutting ice in such pond, the injury, if any, being trifling, the question involved doubtful, and the rights of the parties not having been determined at law.²

§ 16. The lessors of certain water-rights agreed by the lease to draw off the water in a certain manner. After drawing the water for some time as agreed, they began an alteration of the works, alleging that the new works would not injure the lessees, and were not inconsistent with their rights under the agreement. An injunction was granted, to keep the works *in statu quo* until the final hearing.³

§ 17. The obstruction of the flow of water to a mill, and preventing the party from removing the obstructions, or throwing them again into the stream, were held to afford proper ground for an injunction, as “acts obviously injurious not only to the enjoyment of the right, but prejudicial to its existence. Damages at law would be wholly inadequate. — Successive suits, — instead of redressing the wrong, would in the end be worse than the wrong itself. — Equity will restrain acts of trespass or nuisance, to prevent multiplicity of suits. — So, where wrongful acts might become the foundation of an adverse right.”⁴

§ 18. Equity will enjoin a *mill-dam* which may cause irrep-

¹ Belknap v. Belknap, 2 John. Cha. 463, 472-3.

² Cummings v. Barrett, 10 Cush. 186.

³ Buller v. Society, &c., 1 Beasl. 264.

⁴ Per Thompson, J., Scheetz's, &c., 35 Penn. 95.

arable injury.¹ Or restrain the owner of a mill-dam from increasing its height, provided such increase will be the cause of sickness in the family of an adjoining lot.² So an injunction will be granted, to restrain the defendant from keeping up a mill-dam, to the nuisance of the plaintiff's privilege above. The court remarked: "It is objected that the plaintiff has an adequate and complete remedy at law, especially in the power given to the court by a late statute, authorizing them on motion, after judgment for the plaintiff, in an action on the case for a nuisance, to order such nuisance to be removed and abated, as in case of a common nuisance. But is this remedy adequate, within the meaning of the statute? The power given by this statute is obviously discretionary, and the exercise of it will depend upon the circumstances of each particular case; it is to be exercised on motion, all the facts must be proved to the court by affidavit, and besides, it can bind nobody but the party, who must be the actual wrong-doer, and not other parties in interest, claiming rights in the same estate. Further, such an order and warrant could only be to abate and remove the nuisance. The nuisance or cause of damage is the flowage, and that is occasioned by the dam, sluices, and gates, and the nuisance might be abated by hoisting the gates, or removing the planks from a waste-way. These might be so easily replaced, that there would be a strong temptation to do it; and I know of no power to enforce the execution of the warrant after it is once executed. Whereas, a decree in equity can extend to all parties having an interest and bind them, and it may be effectual and perpetual. Instead of requiring an entire prostration of the nuisance, it may be modified and adapted to the just rights of the parties; it may order an abatement in part, determine the height to which the dam may be kept, the terms on which it may be kept up, the mode of using the water, and other incidents, and thus may be more beneficial for both parties, than a mere and absolute abatement."³

¹ *Lyon v. M'Laughlin*, 32 Verm. 423. See *Sprague v. Rhodes*, 4 R. L. 301.

² *Norwood v. Dickey*, 18 Geo. 528.

³ *Bemis v. Upham*, 13 Pick. 169, 170, per Shaw, C. J.

§ 19. On a bill to restrain a suit at law against the plaintiff, for overflowing lands by means of a mill-dam, the court, having sustained the plaintiff's right to maintain the dam, retained the suit, for the purpose of settling the rights of the parties in relation to the height of the dam.¹

§ 19 a. Injunction of interference with the waters of a creek, which rise above a dam, does not prohibit the use of the waters below the dam.²

§ 20. But where different parties, at about the same time, erect mill-dams in a place which admits only of the erection of one, the upper dam being useless, by reason of the one below it; equity will not enjoin the owners of the lower dam from completing it, or compel its removal, before the rights of the parties have been established at law.³ So where the defendants held adverse possession, for twenty years, of water which had previously flowed into the complainant's pond, and used it by means of an aqueduct, but had disused it for three years, and then had begun to reconstruct the aqueduct: held, they could not be enjoined; it appearing that the defendants had not intended to abandon their right; and that acquiescence by the complainant, or those under whom he claimed, for less than twenty years, would be sufficient to justify the refusal of an injunction.⁴ So a party who owns mining claims, but has never worked them, cannot maintain a bill, to prevent an owner lower down from raising a dam, on the ground that the raising will injure him in working his claim, by means of ditches which he has commenced to construct. The plaintiff must wait, until he is damnified in the prosecution of his work by the defendant.⁵ (a)

¹ *Le Roy v. Platt*, 4 Paige, 77.

² *American Co. v. Bradford*, 27 Cal. 360.

³ *Porter v. Witham*, 17 Maine, 292.
See *Society, &c. v. Butler*, 1 Beasl. 498.

⁴ *Haight v. Proprietors, &c.*, 4 Wash. C. 601.

⁵ *Harvey v. Chilton*, 11 Cal. 114.

(a) The lands of C were flowed by reason of a dam erected across a stream, in a case where the rights and remedies of the parties remained as at common law, he suffering the owners of the dam to build, maintain, and repair it from time to time for a period of more than ten years, during which time they made valuable and permanent improvements in mills, &c., and drew water from the

§ 21. Where the complainant in a bill in equity charges that the defendant is placing obstructions in the bed of a navigable river, in front of the complainant's docks, thereby blocking up the channel; he not only shows that he will sustain special damage, quite distinct from what the public will suffer, if the defendant is allowed to complete his erection, but also shows how the injury will be accomplished; and is entitled to an injunction.¹

§ 22. A owned lands on the Delaware River, and held and enjoyed a *fishery* appurtenant thereto. After his death, his estate was divided, by commissioners, among his heirs. They separated the lands, lying contiguous to the river, from the fishery, by lines and fixed monuments, and set off the fishery as a separate share, the line of separation being the usual high-water mark. An injunction, which had been granted, restraining the owner from building a wall on such line, was dissolved.²

§ 23. A contract was entered into between a *canal company* and the plaintiffs, the owners of paper-mills, as to the mode of enjoyment of the waters by which both were supplied. The company did acts in violation of the contract. Held, it was no answer, upon a bill for perpetual injunction, that the acts proposed would not be injurious, or even to prove that they were beneficial, to the plaintiffs; and the court, although no evidence was given of any actual damage done, made a decree for a perpetual injunction.³

§ 23 a. A demurrer to a bill in equity, for want of equity,

¹ Walker v. Shepardson, 2 Wis. 384.

³ Dickenson v. Grand, &c., 19 Eng.

² Howell v. Robb, 3 Halst. Ch. 17. Law & Eq. 287.

dam to propel them. Held, that by such acquiescence in the claim, asserted by them, he would be precluded from maintaining an action to abate the dam as a nuisance, and for an injunction to restrain them from rebuilding and maintaining it, when it had been partially destroyed by a flood; and that he must resort to his common law action for damages. Cobb v. Smith, 16 Wis. 661.

The (Wis.) general mill-dam law is not applicable to dams across navigable streams. Ib. (partially overruling Newell v. Smith, 15 Wis. 101.)

cannot be allowed, unless the court is satisfied that no discovery or proof, called for by the bill or founded upon its allegations, can make the cause set forth in it a proper subject of equitable cognizance. In construing the bill, upon such a demurrer, the court is not at liberty to infer, from facts stated in the bill, facts unfavorable to the plaintiff's right to relief, if indeed it is not bound to make, as in case of a demurrer to evidence at law, every reasonable intendment in his favor. Where a bill, brought to abate a mill-dam which flowed water upon the land of the complainant, alleged that "there has not been upon said dam any mill or other building requiring the use of the water-fall created thereby as a motive power, for more than twenty years last past;" upon general demurrer for want of equity, the court cannot infer that there has been, during the twenty years, a mill elsewhere than at the dam, on the stream issuing from the pond, which required the use of the pond raised by the dam as a reservoir, for the purpose of trying the question, whether, under the mill act, the defendants had a right to maintain their dam for such purpose. It is no ground of demurrer, that, although the bill states or acknowledges that for nearly five years before the filing of the bill the dam had been kept up without compensation made by the defendants, it does not allege, that the right of the plaintiff has, before the filing of the bill, been established in a suit at law; the modern course of a court of equity, in dealing out relief upon such a bill, admitting a wide exercise of discretion to adjust its relief to the circumstances, and the lapse of time, short of the time of limitation, being but one element of laches or acquiescence, capable of being explained by proof, without any foundation being laid for it in the allegations of the bill. Such a bill is not demurrable, because it does not state a case of irreparable or destructive mischief, so that it states that the dam backs the water upon the land of the plaintiff; since, upon such last allegation, the plaintiff would be at liberty to prove a flow to any, the most destructive extent, and no inferences can be drawn against him upon demurrer. Nor is the bill demurrable on this last ground, although it admits that during the last twenty years the dam has been kept up,

and, until within about five years before the filing of the bill, the defendants, as owners of the dam, had compensated the complainant as owner of the lands flowed, for the injury caused by the flowage; for though such admission would be good ground to refuse a preliminary injunction, it would be no ground, the right of the complainant being admitted or established, upon which to refuse relief. Nor is such a bill demurrable, because, although it does not disclose any right of the defendants, existing at the time of the bill filed, to flow the lands of the complainant, but complains of such flow as a nuisance, it does not allege that the flowage complained of is not under claim of right. The court will not imply that the complainant's title is doubtful upon such a bill; and if it were doubtful, though this might modify, it would not necessarily disentitle him to relief.¹ (a)

§ 25. An injunction lies for one in possession of land, to restrain the threatened appropriation of such land for the purpose of a *highway*, (b) where the proper steps have not been taken to secure a suitable compensation to the plaintiff, or to protect him from an improper appropriation.² Or to prevent the laying out and establishing of a road through a farm and improvements, without compliance with the requirements of the law.³ Or in behalf of a person whose right to the use of a pass-way, already in existence, has been obstructed; though not where the establishment of a pass-way is claimed on the mere ground of necessity.⁴ So, it seems, an obstruction of a public street, by fencing it, may be restrained by injunction.⁵

¹ *Sprague v. Rhodes*, 4 R. I. 301.

² *Anderson v. Commissioners, &c.*, 12 Ohio St. 642; *M'Arthur v. Kelly*, 5 Ohio, 140.

³ *Floyd v. Turner*, 23 Tex. 292.

⁴ *Hall v. McLeod*, 2 Met. (Ky.) 98.

⁵ *Langedale v. Bonton*, 12 Ind. 467.

(a) As to the form of injunction in case of nuisance to a watercourse, see *Lingwood v. Stowmarket Co.*, Law Rep. (Eng.) Eq., February, 1866, p. 336.

Upon a grantee's showing an unauthorized obstruction of water by his grantor, he is entitled to an injunction, however difficult it may be to frame an order which will properly limit the rights of the parties. *Patten v. Marden*, 14 Wis. 473.

(b) See Chap. XXVI.

§ 26. But, even if a county court has power to lay out a private way over another man's land, yet, to authorize an injunction for removal of impediments placed there by the owner, it must appear, that, in locating the way, the least possible injury that could be, consistently with the end to be attained, is done to the owner of the land.¹ So, on the other hand, there is no equity in a bill by an abutter, to prevent a city, in the exercise of its powers, from putting down curbstones, on the ground that it is proposing to set them on another than the true line; the matter turns upon a mere question of law, no irreparable injury is threatened, and, it seems, the case is not within equity jurisdiction.² So a land-owner in a city, whose property in buildings will be damaged in value by a proposed change in the grade of a street, has no remedy by injunction against the mayor and council, but, if he has any remedy, it must be at law for damages.³

§ 26 a. The plaintiff and those under whom he claimed had been in quiet and uninterrupted possession of land for twenty-five years. The defendants, the corporation of the city of New York, under pretence that the buildings and fence upon such land stood or encroached upon the highway, entered and disturbed the plaintiff in the enjoyment of the lot. Held, he was entitled to an injunction to restrain the defendants from entering upon, digging, throwing down, or destroying "the ground so possessed" by him, and that the injunction should be perpetual, or until the defendants should have established their title by due course of law. But further, that such injunction did not interfere with their right of digging down the street close to his line, though the necessary consequence was the falling of his soil into the excavation.⁴

§ 27. Where a person sells property lying within the limits of a city, and in the conveyance bounds it by streets, designated as such, in the conveyance, or on a map made by the

¹ Clack v. White, 2 Swan, 540.

² Markham v. Mayor, &c., 23 Geo.

³ Holmes v. Jersey City, 1 Beasl. 402.
299.

⁴ Varick v. The Mayor, 4 John. 53.

city or by the owner of the property ; such sale necessarily implies a covenant that the purchaser shall have the use of the streets. And any obstruction, by the grantors, which denies the exercise of this particular right of way, as a street, works irreparable mischief, and entitles the purchaser to relief, by injunction. In cases like this, the acts of Maryland, relative to opening streets in Baltimore, do not give the complainant, as matter of right, the redress to which he is entitled ; and therefore it cannot be said, that, because of these acts, he is not remediless, except in a court of equity. But, to entitle the complainant to an injunction, the obstruction complained of must work to his great injury, in manifest violation of the obligations of the grantor ; and the facts stated in the bill must show this.¹ (See Chap. XXXI.)

§ 28. A land-owner cannot be compelled by injunction to keep open a way over his land for another's use, unless the right of the latter is clear and undoubted, or established at law.²

§ 29. Where the plaintiff had only one way over the defendant's land, by which he had a prescriptive right to carry his produce to market, but, by sufferance and revocable license, another circuitous way ; and might have such a private way located by the court, at his own expense, as the court might see fit : held, a proper case for injunction, the defendant having obstructed the prescriptive way.³

§ 30. At the time of purchase of a lot of land, it bounded on an alley eight feet wide, which the grantor agreed to make eight feet wider, and did so. Held, that he should be enjoined from reducing the alley to the original width.⁴

§ 30 a. A *mandamus* would perhaps lie, to compel a borough, authorized by law to establish and improve a *wharf*, to provide adequate facilities of wharfage, in case of neglect ; or an injunction, at the suit of some agent of the public, to restrain

¹ *White v. Flannigain*, 1 Md. 525.

² *King v. M'Cully*, 38 Penn. 76.

³ *Shipley v. Caples*, 17 Md. 179.

⁴ *Bechtel v. Carslake*, 3 Stockt. 500.

them from collecting fees for inadequate performance. In either of these modes the question could be tried, once for all parties interested, whether the wharf was well built or whether it needed improvement.¹

§ 31. A bill alleged, that the plaintiffs were owners of a wharf, and the defendants, conspiring together, were threatening forcibly to drive them and their teams and workmen from the wharf, where they were engaged in transporting to other places goods landed on the wharf, and that, unless restrained, they would break up the business; but did not allege insolvency of the defendants. Held, not a case for injunction.²

§ 32. The owner of land is entitled to an injunction against persons undertaking to construct a *levee* thereon, until the amount of his damages has been ascertained and paid according to law.³

§ 33. A court of equity has no power to interfere with the control of the public streets, alleys, and landings in the city of Lyons, given to the corporation of that city by the act of January 24th, 1855, and to restrain the corporation from moving a building standing upon a *public landing*; even although the building was erected in good faith by one who supposed himself to be the owner of the land under a grant from the legislature, and who offered to remove it within such time as the court should direct.⁴

¹ Prescott v. Duquesne, 48 Penn. 118.

² Tomlinson v. Rubio, 16 Cal. 202.

³ Horton v. Hoyt, 11 Iowa, 496.

⁴ Sayers v. Lyons, 10 Iowa, 249.

CHAPTER XXVIII.

LANDS ; LEASE ; MORTGAGE.

1. Questions of title ; vendor and vendee.
- 2 c. *Homestead*.
- 2 d. Execution and other sales.
- 2 h. Injunction on the ground of fraud.
- 2 i. In case of *mining*.
3. Covenants of warranty.
4. Estoppel ; agreement as to the mode of occupation of land sold.
7. Lease — covenants.
8. Mode of occupation.
9. Loss by fire.
10. Insolvency of tenant.
11. Repairs.
12. Distress and other proceedings for recovery of rent.
20. Waste.
23. Miscellaneous points.
- 25 a. License.
26. Mortgage — sale, ejectment, and foreclosure by mortgagee ; injunction in favor of a mortgagee.
34. Waste.
42. Miscellaneous points ; fraud, &c.
48. Effect of foreclosure upon the mortgage debt ; whether an action lies for the balance ; whether the foreclosure is thus opened.
54. Points of practice ; receiver ; sale ; appeal.

§ 1. WE have already (Chap. VI.) considered the application of injunctions to *restrain suits at law*, including, more especially, suits relating to land. (a) It is sufficient to add, in the present connection, a general statement of the rule upon the subject of defences to such suits, in the words of an approved writer and jurist. “ If an ejectment is brought to try a right to land in a court of common law, a court of equity will, under proper circumstances, restrain the party in possession from setting up any title, which may prevent the

(a) See p. 277. As to injunction against a *conveyance* of land, see *Spiller v. Spiller*, 3 Swanst. 556.

fair trial of the right; as, for example, a term of years or other outstanding interest in a trustee, or lessee, or mortgagee. But this will not be done in every case; for, as the court proceeds upon the principle, that the party in possession ought not in conscience to use an accidental advantage, to protect his possession against a real right in his adversary, if there is any counter equity in the circumstances of the case, which meets the reasoning upon this principle, the court will not interfere. Thus, it will not interfere with the possessor, who is a *bonâ fide* purchaser for a valuable consideration, without notice of the adverse claim at the time of his purchase.”¹ (a)

§ 1 a. On the other hand, it is remarked in a late case, in justification of interference where no suit at law had been brought: “The orator, being in possession, — cannot himself institute an action at law to settle the title, and the defendants, though setting up a claim to the lands, have brought no suit against him, and have shown no intention to do so.”²

§ 1 b. An injunction, staying proceedings in ejectment, was granted, on a bill setting up a loss of title deeds, of which the answer fully denied all knowledge. Held, the injunction should be dissolved.³

§ 1 c. An injunction may be issued to prevent irreparable injury to land, though the title is disputed, if the defendant is irresponsible, or if there is no relief at law.⁴ (b) The distinction is taken, that, where there is a privity of estate, as be-

¹ 2 Story, Eq. 219, § 913.

² Horner v. Jobs, 2 Beasl. 19.

³ Per Poland, C. J., Eldridge v. Smith, 34 Verm. 487.

⁴ Spear v. Cutter, 5 Barb. 486. See Waste.

(a) It is a rule of practice in the Circuit Court of the United States, not to allow an injunction of an ejectment, until it can be investigated in equity, unless judgment be entered therein. Turner v. American, &c., 5 McLean, 344.

(b) By a complaint for a temporary injunction against trespassers upon land of the plaintiff, in his possession, it appeared that they were probably doing irreparable mischief, for which an injunction was the only adequate remedy, inasmuch as, though not alleged to be absolutely insolvent, a judgment for damages was shown to be worthless. Also, that the defendants were protected by a bond, but the plaintiff had no protection. An injunction having been dissolved, held, in the court above, the order of dissolution should be reversed. Hicks v. Compton, 18 Cal. 206.

tween a reversioner and particular tenant, an injunction may be had, without irreparable injury; otherwise, where the parties are strangers to each other in reference to the estate, or mutually adverse claimants; whether the act be waste or trespass.¹ And, on the other hand, where both the title to, and the possession of, a tract of uninclosed lands were in dispute and spread upon the record, it was held that, while chancery would not undertake to decide which title should prevail at law, there might be a manifest propriety in declaring one of them to be of such a character, as to render it unwise for the court to exercise extraordinary powers, in prohibiting the exercise of acts of ownership under it. And, the title of both adverse claimants being spread upon the record, and the defendants showing that the complainants had controverted, both at law and in equity, in various ways, the title of the defendants, during fifteen years, and that the defendants had always maintained their title, so far as was necessary for their success, in every controversy; it was held, that the defendants showed a title and possession under it, of such a character, as would preclude a court of equity from enjoining them against acts of ownership under it.²

§ 2. And it is said, in a late case, "Where there is a mere dry question of adverse title, a bill filed on that ground, without more, entitles the plaintiff to no relief whatever."³ Thus the defendants, a railway company, having bought land from A, who appeared by the book of reference to be the owner; the plaintiff, a neighboring owner, whose land was also taken, claimed title to the former lot, and brought a bill to enjoin the possession of, and waste upon it. Injunction refused. The court remarked: "If I were to hold that the plaintiff is entitled to the relief which he asks, and the railway company were to compromise with him, what is there to prevent some other person from filing another bill, showing plausible grounds of title? The consequence of which would be that the company would be stopped again. This is a mere case

¹ *Georges, &c. v. Detmold*, 1 Md. Ch. Dec. 371.

³ *Webster v. The South, &c.*, 1 Sim. N. S. 279.

² *Cornelius v. Post*, 1 Stockt. 196.

of adverse title, claimed upon very slight evidence indeed, and without alleging that an action of ejectment, or an action of trespass, would not give him all the remedy he can possibly be entitled to or wish for.”¹

§ 2 a. Where the defendant in ejectment, obligee in a bond for title, paid a material portion of the purchase-money down, gave a note for the residue, entered into possession, and continued it up to the time of suit by the obligor; held, a strong case for injunction, to prevent the obligee from being turned out under the execution in the suit.²

§ 2 b. Where a tenant for life made a deed with warranty, and the vendee, knowing the defect in the title, gave his notes for the purchase-money, upon which judgments were obtained; held, equity would not enjoin the collection of any part of these judgments, but would leave the vendee to his action on the warranty, the warrantor being insolvent.³

§ 2 c. Questions of injunction have arisen in case of *homestead*.

§ 2 d. One claiming an injunction against the sale of a homestead, in satisfaction of a judgment, upon the ground that there is other property liable to seizure, must prove the fact relied on.⁴ And such bill must state, that the value of the land does not exceed the amount to which a homestead is limited.⁵

§ 2 e. A grantee may enjoin the sale of the premises on execution against the grantor, because such sale, though invalid, would cloud his title.⁶

§ 2 f. A third person cannot enjoin a sheriff from executing a writ of restitution issued upon a judgment in ejectment, the defendant in the judgment not being in possession.⁷

¹ Webster v. The South, &c., 1 Sim. N. S. 272, 279.

² Allen v. Pearce, 6 Jones, Eq. 309.

³ Henry v. Elliott, 6 Jones, Eq. 175.

⁴ Hale v. Heaslip, 16 Iowa, 451.

⁵ Marriner v. Smith, 27 Cal. 649.

⁶ England v. Lewis, 25 Cal. 337.

⁷ Tevis v. Ellis, 25 Cal. 515.

§ 2 g. A sale of land cannot be enjoined, as preventing a multiplicity of suits, when one ejectment against all the tenants would settle the title and fully vindicate the plaintiff's rights, and, upon notice of *lis pendens*, would bind purchasers of the property.¹

§ 2 h. A party in possession, but without title, cannot by injunction restrain the owner from enforcing his title, on the ground that it was fraudulently and illegally acquired, the party defrauded acquiescing in the transfer. There is no equitable estoppel.²

§ 2 i. Where a settler upon public mineral lands petitioned for an injunction against interference with his improvements by neighboring miners; but the actual and prospective injuries seemed slight, and easily susceptible of pecuniary compensation; and the injunction was refused: held, not an abuse of discretion which justified a reversal of this decision.³

§ 2 j. A perpetual injunction may be granted against parties, who have entered upon land for mining purposes, destroyed trees, shrubbery, &c., and threatened to repeat the injury, under claim of right upon payment of the value of the trees, having paid one judgment recovered by the plaintiff.⁴

§ 3. The question of title often arises from the *covenants of warranty* in a deed. (See Chap. XIV.) Thus, A having sold land to B with the usual covenants, B brought his action on the covenant of seisin against A's widow, having given her notice of a defect only a day or two before. She searched out the defect, and procured conveyances to herself, which perfected the title, and which she tendered B, but he declined them. B recovered judgment for the purchase-money with interest. The widow then brought her bill in equity, to compel B to accept the deeds, and to enjoin his judgment; and an injunction was ordered.⁵ So a non-resident, who has

¹ *San Francisco v. Beideman*, 17 Cal. 443.

² *Treadwell v. Payne*, 15 Cal. 496.

³ *Slade v. Sullivan*, 17 Cal. 102.

⁴ *Danhenspeck v. Grear*, 18 Cal. 443

⁵ *Reese v. Smith*, 12 Mis. 344.

not a sufficiency of property or effects, within the State, to make good the damages for the breach of a covenant for quiet enjoyment, will be enjoined from collecting the purchase-money for land, where the title is defective.¹ But where it was simply alleged in a bill, that the plaintiff had been informed of a superior title to the land, for which the note in question was given, and that a suit was pending between other parties, from which it appeared that such title might be the better one, and that, if so, it was doubtful whether the defendant was in circumstances to make redress, in a suit on the covenants; and no ulterior proceeding was suggested as being contemplated, and not even a reference of the title asked: held, it was not proper to allow an injunction.²

§ 4. The question of *implied estoppel* is sometimes raised on application for an injunction. (See *Estoppel*.) Thus the plaintiff, proprietor of a colliery, constructed a railway across the lands of several other persons, by agreement, and his solicitor wrote to the defendant, who was one of these persons, referring to the powers of a local act of Parliament, supposed to enable him to take lands within certain limits for railways, and offering to pay him at a fair appraisal. The defendant did not reply, and the railway was made. More than a year after, the parties met, but did not agree upon a price; and, more than three years after, the defendant brings ejectment for the land. Upon a bill for injunction, held, inasmuch as the dispute had not related to the occupation of the land, but only to the price, the injunction should be granted, upon the plaintiff's giving judgment in the action, and paying into court a sum not less than the amount of the utmost valuation.³

§ 4 a. A bill was filed, setting up an equitable estoppel, to perpetually enjoin the defendant from asserting his legal title to a tract of land, which he had verbally sold to A, who sold to B, who sold to the complainant. It alleged, that A agreed

¹ Richardson v. Williams, 3 Jones, Eq. 116.

² Patterson v. Miller, 4 Jones, Eq. 451.

³ Powell v. Thomas, 6 Hare, 300.

to sell to B, if the defendant would sanction the sale and recognize his verbal contract, and that they together called on him to ascertain whether he would do so ; that the defendant replied, that he did recognize the validity of his contract, that he was willing that A might sell to B, and that he would look to the former for the payment of his purchase-money. The answer admitted these facts, but denied that the defendant thereby intended to surrender his rights to look to the land as security for the purchase-money, or to do more than recognize the validity of his verbal contract. Held, the injunction was properly dissolved on the coming in of this answer, as the facts admitted by it were not sufficient to create an estoppel.¹

§ 5. Bill in equity, alleging that the plaintiffs, believing themselves entitled as devisees to a dwelling-house and shop, agreed to lease them, being out of repair, to a tenant, who thereupon expended money in pulling down and rebuilding ; that the defendant, who proved to be a part-owner, knew the true state of the title, but had claimed the whole, which claim he repeated a few days before commencement of the improvements ; that he also knew of the improvements, and that the plaintiffs and their tenant were acting under a mistake, and yet made no objection. The bill prayed, that the defendant might be required to confirm the lease, and enjoined against evicting the tenant. Held, the tenancy in common did not vary the principles applicable to the case ; that the original claim of the defendant was sufficient to protect his title, although it did not state the particulars ; and an injunction was refused.²

§ 6. There is another form of estoppel, for the enforcement of which injunction seems the most appropriate remedy. It is said, that a court of chancery will recognize and enforce agreements *concerning the occupation and mode of use of real estate*, consistent with public policy, and beneficial to adjacent land, although they are not expressed with technical accuracy, and whether by way of condition, covenant, or otherwise. Nor is it at all material that such stipulations should be bind-

¹ Jones v. Cowles, 26 Ala. 612.

² Master, &c. v. Harding, 6 Hare, 273.

ing at law.¹ Thus an injunction lies, against a purchaser with notice, to prevent the use of a house as a family hotel, in violation of covenants, entered into between owners and purchasers of the lot upon a part of which such house is built, not to carry on the business of an innkeeper.² So, if the owners of land lay it out into house-lots, and orally agree among themselves that they shall be thus exclusively occupied, and convey the lots with a condition to that effect; any purchaser is bound by such condition, and the owners of other lots may maintain a bill in equity to enjoin him from converting a dwelling-house into a public eating-house.³ So where the owner of lots on each side of a public street made a plan, showing an additional strip of eight feet in width, on each side of the street, according to which he sold the lots, and representing that the strip was not to be built upon; and prior grantees of some of the lots complied with the representations, and left the strip open: held, they might restrain grantees of the remaining lots, with notice of the representations, from building upon the strip.⁴ So A and B, owning land in Brooklyn, conveyed two lots to C, and C conveyed the same to D. D demised for five years to E and F, and E assigned all his right, &c., to F, the defendant. Previous to the conveyance to C, A and B had conveyed other lots, in the vicinity of the two lots, and embraced in the same tract, to the plaintiffs or to their grantors, and those lots, at the time of bringing this action, were all owned by the plaintiffs. In all the conveyances made by A and B were covenants, on the part of the grantees respectively, that at no time should there be established or carried on in any manner on the granted premises any trade, business, or calling whatever, which should be in anywise dangerous or noxious or offensive to the neighboring inhabitants. The declaration alleged, that the defendant, having notice of the covenants, when he became interested in the lots demised to him, had established a mill on the premises, which effused noisome and offensive smoke, to the great annoyance of all the neighboring inhab-

¹ Per Bigelow, C. J., *Parker v. Nightingale*, 6 Allen, 344; 11 Gray, 359.

² *Parker v. Nightingale*, 6 Allen 341.

³ *Whatman v. Gibson*, 9 Sim. 196.

⁴ *Tallmadge v. East, &c.*, 26 N. Y. (12 Smith) 105.

itants, and in direct violation of the covenant in C's deed. Held, the covenant ran with the land, and bound all subsequent grantees. That although, as previous purchasers, the plaintiffs could not maintain an action on the covenant against the defendant or his grantors, not being assignees of that covenant, yet, in equity, they, in common with all the other grantees, prior as well as subsequent, had a right under that covenant, as an easement in behalf of the whole property, which they could enforce by injunction. That the only thing necessary to enable a person to be plaintiff in such an action was, that he should hold the title to land within the tract for the benefit of which the easement had been created. That it was immaterial in this action that one of the plaintiffs derived his title through C. And that one whose only interest in the tract was gained by purchase of a dower estate was well joined as plaintiff.¹ So where each of the original owners of houses in a row covenanted with the original owner of the whole land, in reference to the use which should be made of each garden; held, even if the covenants did not run with the land, the purchaser of a house, having notice, was bound by them in equity, and one of such purchasers liable to an injunction against their apprehended violation, at the suit of another owner, although still other owners had violated the covenants without interference, and the plaintiff himself had committed a small breach. And the other owners are not necessary party defendants to such bill.² So the owner of a tract of land laid it out in lots for dwelling-houses, and conveyed one lot with these restrictions: "That if the grantee, his heirs or assigns, shall use or follow, or suffer any person to use or follow, upon any part thereof, the business of a taverner, or any mechanical or manufacturing, or any nauseous or offensive business whatever, then the grantors, or any person or persons at any time hereafter, who at the time then being shall be a proprietor of any lot of land" within the same tract, "shall have the right, after sixty days' notice thereof, to enter upon the premises, and forcibly, if necessary, to remove therefrom any buildings erected or used contrary to the above restrictions, and to abate

¹ *Brouwer v. Jones*, 23 Barb. 153.

² *Western v. Macdermott*, Law Rep. (Eng.) Eq., February, 1867, p. 72.

all nuisances.” Held, that these restrictions, after the deed had been recorded, might be enforced in equity against an assignee of the grantee, in favor of the original grantor, still continuing to own one of the other lots, and not having been guilty of laches; though not to the extent of abating erections made by the first grantee, while he held the land, with the grantor’s knowledge.¹

§ 6 a. But an injunction does not lie, to enforce an oral agreement between the plaintiff and defendant, that they will set back the buildings to be erected by them a certain distance from the street; if followed by a conveyance from the former to the latter of one of the two lots of land built upon, on condition of setting back a less distance, and with warranty against all incumbrances made or suffered by the grantor.² And the court in England refused, under the particular circumstances of a recent case of this class, to grant an injunction on the ground of estoppel.

§ 6 b. By act of Parliament, the Commissioners of Woods and Forests were authorized to make certain new streets according to a certain plan, and to lease and agree to lease the ground in the lines of the streets. They leased two plots, upon which the lessees built two houses in the line of one of the streets. Each lease described the plot leased, as “on the north side of a new street then forming there, called,” &c., and “fronting towards the south on said new street.” The plan referred to exhibited an open space in front of the sites of these houses, but neither lease mentioned the plan. The streets were finished, and the space in front of the houses left open. The commissioners and the paving committee of the parish afterwards authorized certain persons to erect an *equestrian statue* in the open space; which they accordingly did, but not interfering with the line of the carriage-way of the new street in which the houses stood. The lessees thereupon filed a bill for an injunction, alleging that, upon the treaty for the leases, they were shown the plan of the proposed new

¹ Whitney v. Union, &c., 11 Gray, 359. ² Hubbell v. Warren, 8 Allen, 173

street and parts adjacent, indicating that the space was to be open and unobstructed, and that it was stated that opposite the two houses a free passage would be left of certain dimensions, which passage would be contracted by the erection of the statue ; that it would diminish the value of their property, and be a public and private nuisance. An injunction, granted by the vice-chancellor, was dissolved by the chancellor (Lord Cottingham). His lordship remarked : “ If contract be the ground for the interference of the court, it is as applicable to the statue at the top of Portland Place as the statue now in question, although the plaintiffs may not have so much interest in that distant part of the property delineated on the plan. This proposition would evidently lead to the most absurd consequences. A man who is about to sell a corner of an estate may exhibit a plan of the whole estate, in order to show the relative position of that part which he is about to sell ; but is he, on that account, to have his hands forever tied up from the enjoyment and use of all other parts of the estate, and is he to preserve it in exactly its present state ? If, however, the right to the injunction is to be put upon the ground of contract, it is necessary to consider how, in point of law, it is to be supported. Such a contract must be looked for *dehors* the deed. The case assumes that the contract has been carried into effect, and that the estate contracted for has been created by the lease. New agreements, by way of covenant, are entered into, to secure the objects of the grant, but the contract for the lease exists no longer. The plaintiffs’ case is not that a provision has been omitted out of the lease, by fraud, misapprehension, or mistake, but that a separate and distinct contract arose from the mere exhibition of the plan. — The parol agreement was merged in the written contract, if there was one, and both were merged in the deed. — It is said that the statue will be a public nuisance. This it can only be by obstructing the carriage-way ; but I am clearly of opinion that the erection of the statue will, upon the whole, be a great benefit to the public, as contradistinguished from the occupiers of the adjoining houses. It is quite immaterial whether a majority of the inhabitants of the neighboring houses do or do not object, and I give no opinion as to

whether it is likely to depreciate the value of the property of the plaintiffs; but the injury and inconvenience, if any, do not constitute such a description of private nuisance as would justify the interference of this court.”¹ In the course of his elaborate and learned opinion, Lord Cottenham cites several leading cases, among others *The Feoffees of Heriot's, &c. v. Gibson*,² carried from the Scotch Court of Sessions to the House of Lords, in which the following piquant remarks are attributed to Lord Eldon: “There was a reference to one case (the Prince's Street case, *Deas v. The Magistrates of Edinburgh*, House of Lords, April 10th, 1772³), where the magistrates exhibited a plan, with a beautiful view of the disposition of the grounds in front of the new buildings to be erected, a thing which was done here every day without any idea that the proprietors were to be prevented from erecting other houses merely by having exhibited a different disposition of the grounds in a picture, unless it were so stipulated in the contracts between the parties. The magistrates, the ground being their own, began to erect houses where they had exhibited terraces and walks. An action of declarator was brought, to have it declared that the magistrates were not entitled to erect these new buildings, without consent of the feuars, and a process of suspension was also instituted to stop the progress of the work in the mean time. The court refused to pass the bill, and the question came to this house, where Lord Mansfield, who would be remembered as long as the law of England or Scotland existed, made a very eloquent speech. But after all that he had *said*, what he *did* was merely to give an opportunity of examining the question of right. He could easily conceive that deference to his opinion had put an end to further proceedings in that case, the corporation having been, perhaps, almost frightened out of their senses by his speech; but still this was no judgment upon the question of right.”⁴ (See Chap. XXVII., *Estoppel, Easement*.)

§ 6 c. Equity will enjoin one, who covenants not to carry

¹ *Squire v. Campbell*, 1 My. & Cr. 459; 13 Eng. Ch. R. 468.

² 2 Dow. 301.

³ *Ib.* 304.

⁴ *Squire v. Campbell*, 1, My. & Cr. 459; 13 Eng. Ch. R. 468.

on any calling in a house, or suffer it to be used to the annoyance of other houses, from keeping a girls' school; though the covenantee had allowed schools to be kept in other houses in the same neighborhood, and held under the same covenant.¹

§ 7. The relation of *landlord and tenant* gives frequent occasion for the remedy of injunction.² Thus equity will aid a tenant in preventing his landlord from breaking a covenant, which will work a forfeiture of his (the tenant's) estate, although not made with the tenant, and even when a suit at law cannot be maintained on such covenant.³ (a)

¹ *Kemp v. Sober*, 4 Eng. Law & Eq. Quilter, 2 Ed. 219; *Brooks v. Diaz*, 35 Ala. 599.

² See *Camden v. Morton*; *Brown v. Rogers v. Danforth*, 1 Stockt. 289.

(a) A late case in Pennsylvania (*Improvement Co. v. Schmoele*), withholds the remedy of injunction, in case of the wrongful eviction of a tenant. Agnew, J., says: "Every lease implies a covenant for quiet enjoyment. But it extends only to the possession, and its breach, like that of the warranty for title, arises only from eviction by means of title. It does not protect against the entry and ouster of a tortfeasor. Even the entry of the State, by virtue of her right of eminent domain, incurs no breach of the covenant. *Maule v. Ashmead*, 8 Harris, 483; *Ross v. Dysart*, 9 Casey, 452; *Frost v. Earnest*, 4 Wharton, 90; *Dobbins v. Brown*, 2 Jones, 755. This being the law of the relation between landlord and tenant, it is difficult to perceive how an ejectment, even when followed by a writ of estrepement, can be derived (deemed) a breach of the covenant. The rights of a landlord would be almost worthless, if every time a pretender to title may bring an ejectment against his tenant, and issue an estrepement to stay alleged waste, he would find his rent suspended, and his remedies gone until the ejectment should be ended. But an action cannot produce this result, until it has its point in actual or virtual eviction. The tenant has a right to call his landlord into his defence, and if eviction follows, as the result of a failure to defend him, he can then refuse payment of the rent, and fall back upon his covenant for quiet enjoyment to recover his damages. Under the lease between these parties the plaintiffs were bound to pay the rent at the stipulated rate per ton for 120,000 tons per annum, whether they mined the coal or not. The defendants were allowed, until the first day of October, 1864, to fit up the premises and make the improvements necessary to prepare for mining before the rent should commence running. After this time they were bound to pay the rent according to the minimum number of tons fixed. The sum thus stipulated they were bound to pay at all events, and nothing less than an eviction or a discharge would suspend or release. The clause for forfeiture and reëntry, for non-payment of rent could be made effective only by their own default. But it is said to be a great hardship to be prevented from mining by the estrepement, and yet forced to pay the rent. This is so, but it is their misfortune, not that of the lessors. If the ejectment prove to be well founded, they have their remedy on their covenant for quiet enjoyment; and if unfounded, why should the lessors

§ 8. Equity will restrict a lessee to the specific performance of his covenants. (a) And where a lease restricted the use of the premises to "the regular dry-goods jobbing business," and the lessees commenced selling goods at auction therein; held, although there was no damage or irreparable injury done to the lessor, nor any nuisance at law, yet it was a breach of the covenant, and the lessor could have an injunction.¹ So the defendants obtained from the plaintiffs an agreement for a lease of a house adjoining the plaintiffs' coach-making establishment, representing, after other and conflicting statements, that they wanted it for a private house. There was also an agreement that the defendants should expend a certain sum in repairs. Immediately upon taking possession, the defendants proceeded to prepare the premises for the business of coach-making. Held, the plaintiffs were entitled to an injunction.² So where A, a lessee, a druggist, with notice that the landlord will not let the premises for a bar-room, agrees to sublet to B for that purpose, and himself renews the lease; equity will restrain both A and B from using the premises for a bar-room.³ So the administrator of an insolvent estate, having an undivided interest in a block of stores, may enjoin a lessee of one of them from a use injurious to the income of all.⁴ But it is held that equity will not enjoin the use of leased premises for one purpose, merely because the lease contains a provision that they are to be used for another, unless it is also provided that they shall be used for the latter exclusively.⁵

¹ *Steward v. Winters*, 4 Sandf. Ch. 587.

² *Parkham v. Aicardi*, 34 Ala. 393.

³ *Ib.*

⁴ *Bonnett v. Sadler*, 14 Ves. 526.

⁵ *Brugman v. Noyes*, 6 Wis. 1.

suffer? If any remedy lies against the plaintiff in the ejectment for his false plaint, certainly it does not belong to the lessors. This is the whole case of the plaintiffs in this bill as it appears at present, and it affords no ground for a special injunction.

The decree made at *Nisi Prius*, awarding a special injunction is therefore reversed, and the special injunction dissolved."

(a) Where a lessee of alum-works covenanted to leave a certain amount of stock upon the premises; there being reason to fear a breach of the covenant, a decree in equity was made against him. So against a landlord, to restore certain farm stock, taken in violation of his contract. 2 Story, Eq. 25, § 710; *Nuthrown v. Thornton*, 10 Ves. 159.

§ 8 a. A court of equity will, at the suit of a joint owner of the reversion of premises leased for ninety-five years, upon final hearing, perpetually enjoin the lessee, who has purchased in four fifths of the reversion, from building upon, or over, or closing up, or encumbering, contrary to a stipulation in the lease, a private gangway laid out between, and for the benefit of the demised premises, and an estate adjoining owned by the lessee ; and this, without regard to the use or value for use of the gangway, or to the comparative advantage to the plaintiff, and disadvantage to the defendant, consequent upon the injunction.¹

§ 8 b. A grantor, whose deed (an indenture) contained a covenant for himself, his heirs, executors, and administrators, that the building to be erected on the land should not be used for a beer-shop, may by injunction restrain a tenant, from year to year, of the building from thus using it, though the covenant be not construed at law as one running with the land. The lessee is to be regarded in equity as having notice, no less than a purchaser in fee, of all that appears upon the title of the lessor.²

§ 8 c. Where a lessee assigns his lease, with a covenant in the assignment, that the assignee will not carry on a certain trade on the premises, and the assignee underlets to one who has no actual notice of such restriction ; the lessee may restrain this use by injunction against the undertenant, or his assignee, although the restriction was not contained in the original lease. Sir John Romilly, M. R., says: " If not, observe what the consequences would be. A man makes a lease of a large piece of land to a builder ; the builder erects buildings on it, and then assigns, making the assignee covenant not to carry on any noxious trade — as, for example, that of a soap-boiler — which would be injurious to the neighborhood. It is contended that the assignee may grant an underlease, free from this covenant, to a person who may imme-

¹ Beckwith v. Howard, 6 R. I. 1.

² Wilson v. Hart, Law Rep. (Eng.) Eq., August, 1866, p. 461.

diately afterwards set up this very trade to the injury of the whole neighborhood.”¹

§ 9. The earlier cases allowed an injunction against an action for rent, where the premises had been accidentally *burned*. But the later theory is, that the lessee is *pro tanto* a purchaser, and that the loss by fire must fall upon him.² But where a clause has been inadvertently omitted from a lease, though verbally agreed on, discharging the rent in case of loss by fire; equity will enjoin a suit for the rent after the premises have been burned.³

§ 10. In the case of *Buckland v. Hall*,⁴ an injunction against a landlord, who had brought ejectment against the plaintiff, his tenant, after an agreement for renewal of his lease, on the ground of his having become insolvent, was dissolved; the bill also praying specific performance of the agreement. Lord Eldon remarked:⁵ “The court must take care that the tenant is not rashly turned out of possession. With respect to the insolvency, the weight of that objection is more or less in different cases. There is a distinction certainly between a purchase and a lease. In the former instance the bill for specific performance tenders payment of the purchase-money; the latter is very much otherwise; and the court ought not to forget the habit of dealing among mankind with regard to the relation of landlord and tenant. Every man taking a tenant looks to the probability of the rent being paid; that attention is paid to that circumstance through the whole currency of the lease, that introduces a provision not to assign or underlet without license. If the tenant undertakes for nothing but the payment of rent, it (insolvency) must be appreciated accordingly. If beyond that he undertakes for considerable expenditure upon the premises, before he is to be placed in the relation of lessee, that is directly connected, as a most impor-

¹ *Clements v. Welles*, Law Rep. (Eng.) Eq., February, 1866, pp. 199, 202.

² *Fowler v. Bott*, 6 Mass. 67; *Brown v. Quilter*, Ambl. 621; *Camden v. Morton*, 2 Ed. 219; *Steele v. Wright*, 1 T. R. 708; *Hare v. Graves*, 3 Anst. 687;

Holtsappfell v. Baker, 18 Ves. 118; 1 Fonb. Eq. 374.

³ *Wood v. Hubbell*, 10 N. Y. (6 Seld.) 479.

⁴ 8 Ves. 92.

⁵ *Ib.* 93.

tant circumstance, with the fact of solvency or insolvency. The injunction ought not to be sustained ; certainly not without considerable terms imposed ; such as bringing no writ of error ; giving security for the costs ; perhaps for the rent and repairs."

§ 11. In the case of a lease, granted by the defendant and assigned to the plaintiff, for the purpose of erecting mills and other buildings, with covenants for the supply of canals and reservoirs on the defendant's estates, and with certain reservations to the defendant for uses paramount to those of the lease ; Lord Eldon expressed doubt, upon a bill for an injunction, whether it was according to the practice of the court to order specifically that the defendant should repair the banks of the canal, stop-gates, and other works ; but passed an order to restrain impeding the plaintiff from navigating, using, and enjoying the premises, by continuing to keep the canals, banks, or works out of repair, by diverting the water, or preventing it by the use of locks from remaining in the canals, or by continuing the removal of a stop-gate ; his Lordship somewhat sarcastically remarking : "He will find it difficult, I apprehend, to avoid completely repairing these works." ¹

§ 12. Equity will not enjoin a distress for rent, on account of an agreement under which the landlord owes the tenant more than the amount of such rent. The court say : "The policy of the law does not permit a set-off against a distress, and a court of equity must follow the law, and cannot relieve against the rule of law, where the claim of set-off is founded on a legal demand. It is not necessary to consider how the case might be if the tenant had a counter demand, not at law, but in equity." ²

§ 13. The common injunction to stay proceedings at law does not embrace a distress for rent. Lord Eldon remarked : "I think I remember a great many special applications to restrain distraining for rent because it does not fall within the

¹ *Lane v. Newdigate*, 10 Ves. 192.

² *Townson v. Benson*, 3 Madd. 110-114.

strict meaning of a proceeding at law ; it may be stopped by replevying, and is the execution of the party himself ; but a proceeding at law is where a party applies for the aid of a court of law.”¹

§ 14. Where a vendor has executed a legal assignment of property to a purchaser, chancery will not, on the application of the latter, enjoin the former from illegally distraining upon the tenants of the property, for alleged arrears of rent accrued since the assignment.²

§ 15. Where a tenant gave security to the landlord of the stock on the farm, with an agreement that, whenever the arrears due for advances should exceed a certain sum, the landlord might enter and sell the property ; a bill was restrained in favor of the tenant for restoration of the stock seized, the answer not alleging that more than the specified sum was due at the time of seizure.³

§ 16. Lease to A from B of a store for a monthly rent. A afterwards conveyed his stock in trade in the store, in trust, to secure a certain sum to C. The trustees took possession of the goods, just after B had induced A to surrender and cancel the lease, and had substituted another and different one, which was antedated, and under which the rent for the whole term was payable in advance. Upon this B brought a suit, attached, levied, and claimed a landlord's lien upon the stock. C brings a bill for relief, alleging these facts and the insolvency of A, and tendering the rent actually due. Held, C was entitled to the relief prayed for.⁴

§ 16 a. A parol surrender of demised premises, invalid at law, will be sustained in equity, when consummated by a delivery, of the counterpart of the lease, the key of the dwelling, and the possession of the premises, to the landlord. In such case, the court will enjoin collection of the after-accruing

¹ Hughes v. Ring, 1 Jac. & W. 392.

³ Nutbrown v. Thornton, 10 Ves.

² Drake v. West, 17 Eng. Law & Eq. 159.
367.

⁴ Grey v. Hudson, 5 Clarke, 554.

rents, and, when the ends of justice require it, the injunction will be continued to the hearing.¹

§ 17. To obtain an injunction against a lessee for removing a crop, a part of which is due to the plaintiff as rent, the bill must aver the lessee's insolvency, and that he has no tangible property liable to execution or attachment.²

§ 18. A yearly tenant, with the option of purchasing, filed a bill against the landlord for specific performance of the contract of sale. The landlord having proceeded to eject him; held, the tenant was entitled to an injunction, upon undertaking to pay the rent, without prejudice to any question in the cause. But it was afterwards agreed that he should pay the purchase-money into court.³ So, pending a sale of the estate by the landlord to the tenant, the former will be enjoined from enforcing payment of the rent.⁴

§ 18 a. Lease from the defendants' intestate to the plaintiff, for ninety-nine years, renewable forever, for the sole consideration of a fixed annual rent. After the death of the intestate, his widow by legal proceedings obtained an assignment of dower in the rents, issues, and profits of the leased premises, and the plaintiff brings an action against the administrators upon the covenant for quiet enjoyment, making the reversioners parties. Held, they should be enjoined from collecting more than two thirds of the rent during the widow's life.⁵

§ 19. The removal of a lessor to another State is no ground for an injunction to stay a suit for the rent, in order to enable the defendant to set off damages caused by an eviction.⁶

§ 20. We have already considered the general subject of injunction to prevent *waste*. (See *Waste*.) As between landlord and tenant, it is sufficient ground of injunction, that a

¹ *Stotesbury v. Vail*, 2 Beasl. 390.

² *Gregory v. Hay*, 3 Cal. 332.

³ *Pyke v. Worthwood*, 1 Beav. 152.

⁴ *Daniels v. Davison*, 16 Ves. 253.

⁵ *M'Alpin v. Woodruff*, 11 Ohio, 120.

⁶ *Tone v. Brace*, 8 Paige, 597.

tenant threatens or manifests an intention to commit waste.¹ So it is held that equity will enjoin an act, contrary to the covenant of the tenant, or even to an agreement which may be implied from the course of dealing between the parties, though not amounting to waste.² So an injunction was granted, where a tenant, in revenge for a distress, threatened to sow the land with mustard-seed, which is very injurious to the soil, and very difficult to eradicate.³ So where, in a case for waste, the defendant claimed possession by title, but admitted that he was let into possession by the tenant of the plaintiff, in breach of his duty; held, the defendant's title was no better than the tenant's, and an injunction was ordered.⁴ So where a lessee began to pull down and remove a brick building on the land; an injunction was ordered, with damages.⁵ But an injunction against waste will not be granted, where the article in question is a mere movable fixture, and not annexed to the freehold; as in case of a *dove-cote*, and the removal of locks from the doors of the house, the chains from the lawn, the statues, images, and fences from the pleasure-ground, or wardrobes, presses, and closets, forming part of the wainscot of the house.⁶ Nor will an injunction be granted against a lessee's removing manure. He has a right to manure accumulated by feeding cattle from provender brought from other sources, and to remove it, so far as not mingled with the soil, with diligence and skill sufficient to prevent injury.⁷

§ 21. A lessee, complainant in a bill in equity, cannot enjoin a third party from removing metals from the premises, if his lease expires before a hearing.⁸

§ 21 a. Where a lessor during the term enjoins the removal of fixtures; a reasonable time shall be allowed the lessee, after dissolution, to demand and remove them, though the

¹ *Mayor, &c. v. Hedger*, 18 Ves. 355; *Caldwell v. Baylis*, 2 Meri. 408; *Gibson v. Smith*, 2 Atk. 182; *Kimpton v. Eve*, 2 Ves. & B. 349.

² *Lord Grey v. Saxon*, 6 Ves. 106.

³ *Pratt v. Brett*, 2 Mod. Ch. 62; *Tayl. L. & T.* § 691.

⁴ *Comthope v. Maplesden*, 10 Ves. 291.

⁵ *Jungerman v. Bovee*, 19 Cal. 354.

⁶ *Kimpton v. Eve*, 2 Ves. & B. 349.

⁷ *Gallagher v. Shipley*, 24 Md. 427.

⁸ *Boyle v. Laird*, 2 Wis. 431.

term expired pending the injunction. On dissolution, the value of the fixtures is not to be assessed as damages.¹

§ 21 b. Upon a bill by lessor against lessee to restrain the pulling down of houses, although such bill could not be sustained if all the mischief had been done before the filing of the bill, and therefore no damages could be given: yet, if there was room for the intervention of the court by way of injunction to protect from further injury the buildings still standing at the filing of the bill, and to restrain the further breach of covenant not to injure or pull down the principal timbers or walls; the court may also assess damages for breach of covenant already committed.²

§ 22. Lease from A to B of a coal mine, at the rent of £300 per year, and subject to a royalty of 10s. for every *wey* in each year over 600; B to have the right of determining the lease when the coal should be worked out. B worked the mine several years, and, when it was nearly exhausted, was prevented, by accidents, and defects in it, from continuing to work it without ruinous cost. B offered to pay 10s. per *wey* for all the remaining coal. Held, a suit for the rent could not be enjoined.³

§ 23. Pending an ejectment by a lessor, to recover the premises under a forfeiture for non-payment of rent, he filed a bill, to restrain the lessee from collecting the rents from his subtenants, stating that the plaintiff had been informed, and believed, that there was no sufficient distress upon the premises. Held, this allegation was not sufficiently verified, and that the proper course for establishing the fact was by actual distress.⁴

§ 24. The plaintiffs having brought an action against the defendant, who was their tenant of a mill, for breaches of covenant in a lease as to paying rent and repairing, the de-

¹ *Bircher v. Parker*, 38 Mis. 118.

² *Hindley v. Emery*, Law Rep. (Eng.) Eq., January, 1866, p. 50.

³ *Phillips v. Jones*, 9 Sim. 519.

⁴ *Stuyvesant v. Davis*, 9 Paige, 427.

fendant proposed to plead, as an equitable defence, that it was agreed between the parties, that the defendant should surrender, by yielding the premises in his occupation, and permitting the plaintiffs to receive the rent, and the tenants of the other portions to attorn, and that the defendant should pay the sum of £250 and give up a quantity of machinery to the plaintiffs, in consideration of the tenancy being put an end to, and in discharge of all claims under the lease. That the defendant accordingly paid such sum of money and delivered up the lease, and withdrew from possession of the premises occupied by him, and permitted the plaintiffs to receive the rents of the tenants who were willing to attorn, and that the defendant relinquished also the machinery, and had done all conditions precedent, and had been ready and willing to do all other things necessary on his part for putting an end to the tenancy, and by way of satisfaction as aforesaid; and that this action was brought in fraud and breach of the agreement, and that it was entirely the fault of the plaintiffs that such surrender was not completed. Held, such plea did not constitute an equitable defence, within the 17 & 18 Vict. c. 125, §§ 83, 86 (the common law procedure act, 1854), as a court of equity would not either compel performance of the agreement, or restrain the plaintiffs from executing their judgment, without at the same time compelling the defendant to execute a surrender in writing, pursuant to the statute of frauds; and that this court had no power to compel the defendant to execute such surrender. That the power of the court to act, under the above sections, is confined to cases where they are empowered to grant an injunction absolute and without terms.¹

§ 24 a. The plaintiff was execution purchaser of goods and a lease of the defendant, and put in possession by the sheriff, but received no assignment of the term. The defendant having brought ejectment and recovered, the plaintiff files a bill for injunction. The answer admits the plaintiff's case, but relies upon irregularities in the service of the execution. In-

¹ *Mines, &c. v. Magnay*, 28 Eng. Law & Eq. 447.

junction allowed, with liberty to the plaintiff to take such proceedings at law as he might be advised to perfect his title.¹

§ 24 b. The plaintiff brought a suit for injunction on a covenant against the defendant, his tenant, which was dismissed, with costs; and afterwards an action for rent, in which he recovered judgment. Damages were subsequently assessed in chambers for the defendant, on account of the injunction. The plaintiff was also entitled to the costs of an unsuccessful summons to vary the certificate for damages taken out by the defendant. Held, the plaintiff might set off his judgment against the damages, but not against the costs of suit; and might also set off his costs of the summons against the costs of suit.²

§ 25. The service of an injunction, at the suit of a stranger, asserting a title to a ferry in the possession of a lessee, and restraining him from interfering in the use of the ferry, is not an eviction, and therefore will not prevent the lessor from recovering rent when the bill is dismissed. But although a sheriff, serving an injunction, may have no authority to expel one from the possession of a ferry, or put another in, yet, if he does so, the lessee may consider it a lawful expulsion, if the plaintiff in the suit is invested with a title paramount to that of his lessor.³

§ 25 a. In the nature of a lease is a *license*. Where money has been expended or improvements have been made and buildings erected on the faith of a parol license, equity will at least restrain the licenser from appropriating the money and labor thus expended, without replacing the other party in his former situation.⁴

§ 26. The plaintiff, a *mortgagee*, brought a bill to foreclose; and the defendant, the mortgagor, moved for an in-

¹ Jones v. Hughes, 1 Hare (23 Eng. Cha.), 383.

² Throckmorton v. Crowley, Law Rep. (Eng.) Eq., February, 1867, p. 195.

³ Ricketts v. Garrett, 11 Ala. 806.

⁴ Hazelton v. Putnam, 3 Chandl.

junction against proceedings at law upon the mortgage, which had also been commenced, upon the ground that the plaintiff had lodged the title-deeds with an attorney, who claimed a lien upon them for professional services. Lord Redesdale, L. C., remarked: "The general rule is that when a party is suing in this court, he shall not be allowed to sue at law for the same debt. But the case of a mortgagee is an exception. — The mortgagor has a right not to be obliged to pay the money on his bond, if he is in danger of not getting back his title-deeds; the mortgagee can have nothing but on condition of reconveying and giving up the title-deeds. — I shall direct an injunction to stay proceedings at law, and refer it to a master to take an account of what is due, and the costs of the proceeding at law — and that the money shall be paid into the bank, to remain until the title-deeds are secured, and a reconveyance can be had." The mortgagor "must pay the costs here also."¹

§ 26 a. It is held that a mortgagee will be restrained by injunction from proceeding at law to sell the equity of redemption.² (a) So where property was under mortgage to its full value, a subsequent judgment creditor was restrained by injunction from selling the premises, and the mortgagees were ordered to foreclose with all possible despatch.³ So the assignee of a first mortgage may restrain a writ of entry against him, to foreclose a subsequent mortgage, which embraces another lot now owned by the assignee of the second mortgage, and liable to contribute to payment of the mortgage debt.⁴ So the (Cal.) statute, limiting the time for issuing executions upon judgments to five years, is applicable to a decree of foreclosure and sale of mortgaged premises, and an action will lie to enjoin such sale after the lapse of five years.⁵ So a mortgagee will be enjoined against a sale under a power in the mortgage, where the homestead right is

¹ *Schoole v. Sall*, 1 Sch. & Lef. 176.

² *Severns v. Woolston*, 3 Green, Ch. 220.

³ *Duncan v. Edwards*, 2 Desau. 369.

⁴ *Kilborn v. Robbins*, 4 Allen, 369.

⁵ *Stout v. Macy*, 22 Cal. 647.

(a) See, as to mortgage, *Long, &c. v. Mallery*, 1 Beasl. 93; *McIntier v. Shaw*, 6 Allen, 83.

not released.¹ So on a decree in foreclosure, the amount of the debt was paid by the defendant, and receipted for, and the interest forfeited to the school-fund as usurious, and the costs paid. Six months afterwards the defendant conveyed a portion of the premises described in the mortgage, and subsequently the plaintiff appealed, and the decree was reversed, and another decree entered for the foreclosure of the mortgage. Held, the purchaser might enjoin a sale under the decree for foreclosure, and that he was not to be charged with notice of the right to appeal, *pendente lite*.² So, in 1828, B. mortgaged to P. one acre of land to secure \$1700, and, in 1829, conveyed part of the mortgaged premises to E., and on the same day P. released this part from his mortgage. On the following day, P. assigned his mortgage to A., with notice of the release; and the land thus conveyed and released subsequently became vested in the complainants. In 1844, A. filed his bill for foreclosure and made the complainants parties, and, taking no notice in his bill of the release, procured a decree for the sale of the whole premises. After the decree, but before a sale under it, A. informed the complainants, that he disclaimed all right to the land so held by them, and all intention to disturb them in respect thereto. The entire mortgaged premises were afterwards sold by the sheriff, under the decree, to the defendant, who at the time of his purchase knew of the release, and of the claim of the complainants under it. Held, on a bill filed by the complainants, to restrain the defendant from proceeding at law to recover possession of the part released, and from aliening the title thereto; that the facts furnished a strong case for equitable relief, and the injunction granted on filing the bill was made perpetual.³

§ 26 b. An injunction should be granted, until a hearing, to restrain the sale of lands and farming stock, alleged to be conveyed to the defendant by a deed, absolute on its face, but intended only as a mortgage, and put in its present form through his fraud and oppression. The answer denied the

¹ *Boyd v. Cudderback*, 31 Ill. 113.

² *Pierson v. Ryerson*, 1 McCart. 181.

³ *Davis v. Bonar*, 15 Iowa, 171.

fraud, and any agreement for redemption, but contained admissions, which, taken in connection with the bill, furnished probable ground of belief in the plaintiff's allegations.¹ But, on the other hand, the plaintiff gave to the defendant, as security for a loan, an absolute deed of land, taking back his bond to reconvey, on payment at a certain day, but not afterwards, and a lease till that day. Upon non-payment, the defendant brought an action against the plaintiff, as a tenant holding over contrary to the terms of his lease; pending which action the plaintiff brought a suit against the defendant, praying that the deed and bond might be adjudged a mortgage, and the defendant perpetually enjoined from further suit to recover the premises. Held, the plaintiff was not entitled to a perpetual injunction; but judgment must be entered for the plaintiff, provided he should pay the amount due, with costs, within a time specified; otherwise his complaint must be dismissed.²

§ 27. Where a mortgage of personal property, given to secure a bond payable in three years, with interest annually, and containing a provision, that, on default of payment of the principal sum, or of the interest, at any time when the same should become due, it should be lawful for the mortgagee to grant, sell, &c., was foreclosed for the first instalment of interest; held, the mortgagee had a right to foreclose and collect the whole debt. But on the coming in of the mortgagee's answer, with application to dissolve an injunction obtained by the mortgagor, it appearing that some of the property for which the debt was incurred was greatly impaired in value; held, the injunction should be continued, until there could be a hearing on the merits.³

§ 28. Where a purchaser of mining lands, machinery, and other property, gave a mortgage on the property to secure the purchase-money, and, on account of difficulties arising in the title to portions of the property, it was agreed in writing, on

¹ *Peeler v. Barringer*, 1 Wins. (N. C.) No. 2 (Eq.) 5.

² *Plato v. Roe*, 14 Wis. 453.

³ *Shellman v. Scott*, Charl. R. M. 380.

certain conditions as to paying interest and a sum down, that the payment of the residue of the purchase-money should be postponed until certain suits about some of the property should be settled; it appearing that such conditions had been complied with, held, an injunction to restrain the mortgagee from selling for the purchase-money due ought not to have been dissolved on the coming in of the answer, but it should be continued until further order.¹

§ 29. In Iowa, in a proceeding in equity to enjoin a summary foreclosure, under Code, c. 118, the court has power, under § 2084, to decree a foreclosure in favor of the respondent, without a cross-bill or anything praying a foreclosure.²

§ 29 a. After forfeiture, the mortgagee, even without foreclosure, may upon due notice sell and transfer the absolute right to chattels; and actual possession is not essential to support his title.³ So an allegation, that the mortgagee threatens and is about to sell the mortgaged premises, absolutely and without right of redemption, is no ground for an injunction against his proceeding to foreclose by advertisement.⁴ So a court of equity will not enjoin an action of ejectment by a mortgagee, to recover the mortgaged premises, where no discovery is prayed, and performance of the condition is insisted upon by the mortgagor as his ground of relief.⁵ So a secret understanding between A, a mortgagor, and B, a mortgagee, for a sham sale of the mortgaged premises to B, in order to defraud C, will not sustain a bill, brought by A, to restrain B from selling the property for his own benefit.⁶ So the mortgagees of the corporate property of a railroad brought suit for foreclosure, and at the same time, from the same court, obtained an order appointing a receiver, from which the company appealed, and also, by the proper undertaking, stayed proceedings in the lower court. Before decision of the appeal, the mortgagees discontinued their foreclosure suit, and notified the defendants of its discontinuance, and of their readiness to pay

¹ *High, &c. Co. v. Grier*, 4 Jones, Eq. 132.

² *Westfall v. Lee*, 7 Clarke, 12.

³ *Chapman v. Hunt*, 2 Beasl. 370.

⁴ *Armstrong v. Sanford*, 7 Min. 49.

⁵ *Henry v. Tupper*, 1 Williams (Vt.), 518.

⁶ *Randall v. Howard*, 2 Black, 585.

accrued costs, also offering that the order for the receiver might be cancelled, and to pay the costs upon that also. Held, the mortgagees must go out of court in their foreclosure suit, perhaps on such terms as the court below might see fit to impose; that the appeal fell as a matter of course, and there was no ground, at the request of the company, to enjoin the proceedings of parties who had obtained possession of the road by virtue of certain proceedings in the United States District Court.¹

§ 29 b. In an action in equity for the release and discharge of a mortgage, executed by the petitioner to the defendant, the answer put in issue the allegations of the complaint, but did not ask for affirmative relief. The plaintiff petitioned for and obtained an injunction against a foreclosure by advertisement, pending the action. On appeal from the order allowing the injunction, held, under the (Min.) statute, a mortgagee has two remedies or methods of foreclosing his mortgage, and could not, in such action, be compelled to ask for affirmative relief, or be barred from foreclosing by advertisement.²

§ 29 c. Though a party, proceeding to foreclose, by advertisement, and sell the property for more than was due, may be restrained by injunction; equity will not ordinarily interfere in such case, unless it is shown that great or irreparable injury would be suffered by the applicant, or that he is entitled to more immediate relief than can be obtained by the ordinary course of proceedings, and that his rights are clear, beyond reasonable doubt. The facts must be stated, from which the court can find that such injury would result; the opinion of the petitioner is not sufficient.³

§ 29 d. Equity will not enjoin a pending suit to foreclose, although the holder of the equity of redemption offers in his bill to redeem.⁴

¹ *Spaulding v. Milwaukee, &c.*, 12 Wis. 607.

² *Montgomery v. McEwen*, 9 Min. 108.

³ *Ib.*

⁴ *Kilborn v. Robbins*, 8 Allen, 466.

§ 30. Equity will not enjoin an action of ejectment by a mortgagee, to recover the mortgaged premises, where no discovery is prayed, and a performance of the condition is insisted upon by the mortgagor as his ground of relief.¹

§ 31. An injunction will not be granted to restrain a mortgagee, where he advertises the mortgaged property for sale, "to the full extent of the powers derived to or by him under and by virtue of" the mortgage deed, "and not otherwise."²

§ 31 a. A suit for the mortgaged note will not be enjoined, upon the ground that the mortgagee, having a power of sale, has contracted to sell part of the estate for a sum exceeding the amount due on the note.³

§ 31 b. Although, ordinarily, the equity of redemption of a mortgage of chattels in possession may be sold under an execution against the mortgagor, equity will not permit it, where of necessity it will greatly impair the rights of the mortgagee.⁴ But a bill brought by the holder of a mortgage, which is subject to a judgment, to enjoin a levy upon such judgment, must allege that the mortgagor, at the time of the issue and levy of the execution, had the legal title to the land.⁵ And a purchaser of mortgaged property at a foreclosure sale, who has not yet received the sheriff's deed, cannot enjoin a sale of the equity of redemption, ordered in a suit brought to enforce a mechanic's lien, to which suit he was not made a party.⁶ So where A executed to the plaintiff a deed of real estate, which was subsequently levied on by an execution creditor of A; and the plaintiff sought to restrain the sheriff's sale, as casting a cloud upon his title; but the deed was adjudged to be in effect a mortgage: held, that there was no ground for the bill, as the sale passed only A's actual interest.⁷

¹ *Henry v. Tupper*, 1 Williams, 518.

² *York, &c. v. Myers*, 41 Maine, 109. 408.

³ *Willes v. Levett*, 1 De G. & S. 392.

⁴ *Smithurst v. Edmunds*, 1 McCart.

⁵ *Massie v. Wilson*, 16 Iowa, 390.

⁶ *Macovich v. Wemple*, 16 Cal. 104.

⁷ *Purdy v. Irwin*, 18 Cal. 350.

§ 32. Where a mortgage is made for the purchase-money of land, it is held that equity will not enjoin a foreclosure for want of title in the mortgagee, who conveyed with warranty, without an allegation of fraud, mistake, or irreparable injury. Otherwise, the remedy is on the covenants.¹ Nor against an assignee of the mortgagee, the mortgagor having retained possession and given a new bond and mortgage to the assignee.² But where land purchased and mortgaged back is subject to liens against the vendor, for more than the amount of purchase-money sued for; such suit may be enjoined, until they are reduced to that point.³ So where, previous to the obtaining of an order of seizure and sale for the price secured by mortgage on the property sold, the vendee had commenced an action of *quanti minoris* against the vendor, which, if successful, would absorb the amount of the executory demand; held, an injunction against the order should be perpetuated, without prejudice to the defendant's eventual rights.⁴

§ 33. Where a corporation, holding a mortgage to secure money loaned at seven per cent., the money having been advanced in the shape of certificates of deposit payable in twenty years at five per cent., was proceeded against and enjoined from foreclosing the mortgage, because it appeared doubtful whether the transaction was legal; the court refused to dissolve the injunction on the coming in of the answer, but allowed the corporation to file a cross-bill to compel a sale of the property.⁵

§ 33 a. Where an injunction, against selling the mortgaged premises under a decree in a foreclosure suit, is dissolved, the damages should include the interest upon the whole sum, the collection of which was either suspended or defeated, the counsel fees for obtaining the dissolution, the taxable costs of so much of the proceedings in the suits as were necessary to obtain such dissolution, and the costs of the reference to

¹ *Crockery v. Robertson*, 8 Clarke, 404; *Young v. Butler*, 1 Head, 640; *Stipe v. Stipe*, 2 Ib. 169.

² *Bumpus v. Platner*, 1 John. Ch. 213.

³ *Arnold v. Curl*, 18 Ind. 339.

⁴ *Walker v. Cucullu*, 15 La. An. 689.

⁵ *Stoney v. American, &c.*, 4 Edw.

a master to ascertain the amount of the damages. And, the purchaser, upon foreclosure and sale, being entitled to the growing crops or emblements, as against the mortgagor; the value of such crops taken off by the mortgagor, during the time in which the sale was suspended, should be allowed as a part of the defendant's damages.¹

§ 33 b. If either the mortgagor of lands, or purchasers from him, pending a suit for foreclosure, or after a sale, refuse to surrender possession to the purchaser under the decree; the court, on motion, may order that he deliver possession. If disobeyed, an injunction may issue, and, on proof of service of the injunction, and continued refusal, the purchaser may proceed either by attachment or by a writ of assistance. *Pro hac vice*, the purchaser is a party to the decree.²

§ 33 c. The owner of one of several parcels of land, which are liable ratably to contribute to the payment of a common incumbrance, cannot enjoin the sale of his parcel in satisfaction of such incumbrance, until the amount to be paid by the respective owners is settled.³

§ 33 d. A late case in Massachusetts presents the singular concurrence of facts, that a plaintiff in equity brought a bill for relief on account of fraud, and praying for an injunction against a sale by the defendant of property mortgaged to him with power of sale, the plaintiff having himself sold under a similar power other property mortgaged to the defendant, which mortgage, with the note, was assigned to the plaintiff. And it was held, that, having been induced by fraud to purchase the latter note and mortgage, and sold the property for less than the amount of the note, before notice of the fraud; the plaintiff might maintain the bill without first taking legal measures to collect the note. And a decree was rendered, that the note given by the plaintiff be given up to him, and the mortgage discharged; the injunction made perpetual; and for the balance due him on rescission of the contract.⁴

¹ Aldrich v. Reynolds, 1 Barb. Ch. 613.

² Jackson v. Warren, 32 Ill. 331.

³ Massie v. Wilson, 16 Iowa, 390.

⁴ Franklin v. Greene, 2 Allen, 519.

§ 34. Doubts have been sometimes expressed, whether an injunction would be granted against the commission of *waste* by a mortgagor, as, for example, by the cutting of timber; the mortgagee being held in fault for leaving him in possession.¹ So it has been held that the court would not thus interfere, unless first satisfied that the security was defective.² But it is now the prevailing doctrine, that the mortgagee may have an injunction, though the debt is not due, if the mortgagor in possession commits waste, or in any way attempts to diminish the value of the property; or, if it consists of personalty, where he is about to sell or remove it beyond the reach of his creditor or the court.³ An injunction lies more especially, where the mortgagor is insolvent or the land is scanty security for the debt. So it will be granted for the destruction of underwood, if contrary to the usual course of husbandry; though not of underwood generally, even though the mortgagor is insolvent or a bankrupt.⁴ So after decree for an account under a bill of foreclosure, though not praying an injunction, if the mortgagor attempts to cut timber, the court will enjoin him.⁵

§ 35. If the interest of the estate require that the wood be cut, chancery may make provision for the cutting of it upon the mortgagor's giving security. Thus, where a large proportion, in value, of pine woodland was burned over, and it was proper, in order to save the burned wood from rotting, and for the permanent benefit of the estate in reference to the new growth, that the burned wood should be cut off, the land without the wood being of small value; and the mortgagor was proceeding to cut it, when the mortgagee obtained an injunction: held, the value of the wood should be ascertained by a reference, in order that the mortgagor might give security.⁶

¹ *Usborne v. Usborne*, 1 Dick. 75.

² *King v. Smith*, 2 Hare, 239.

³ *Chapman v. Hunt*, 2 Beasl. 370; *Nelson v. Pinegar*, 30 Ill. 473; *Salmon v. Clagett*, 8 Bland, 180; 5 G. & John. 314; *Murdock*, 2 Bland, 461.

⁴ *Bunker v. Locke*, 15 Wis. 635; 1 Pow. 165; *Humphreys v. Harrison*,

1 Jac. & W. 581; *Hampton v. Hodges*, 8 Ves. 105; *Brown v. Stewart*, 1 Md. Ch. 87; *Ensign v. Colburn*, 11 Paige, 503.

⁵ *Wright v. Atkins*, 1 Ves. & B. 314.

⁶ *Brick v. Getsinger*, 1 Halst. Ch. 391.

§ 36. A purchaser of part of a mortgaged estate may have an injunction against waste, by an assignee, for benefit of creditors, of the mortgagor, of another part; standing in the light of a surety for the mortgage debt.¹

§ 37. A mortgagor in possession, after a sale under decree and execution, will be restrained from waste.²

§ 38. An injunction against a mortgagor, restraining him from quarrying on a quarry lot, the half of which was conveyed as such to him by the mortgagee, and to secure the consideration for which conveyance the mortgage was given; was dissolved, on an answer denying the charges in the bill, from which it might be inferred that the defendant was improperly impairing the value of the mortgaged premises and endangering the complainant's security.³ So another creditor of a railroad company, which had mortgaged its road and equipments, levied on the personal property of the company, while in their possession, and before the maturity of the mortgages. The mortgagees applied for an injunction, on the ground that the rolling stock was necessary to enable the company to pay interest as it was to become due. Held, in the absence of any averment that the property left after the levy would be insufficient to pay the principal and interest upon the next default, the injunction could not issue.⁴ And a mortgagor will not be compelled to repair, where the estate has been injured without his fault; as, to rebuild in case of destruction by fire.⁵

§ 39. An injunction may be granted against the mortgagor, where the mortgage is for years.⁶ (a)

¹ *Johnson v. White*, 11 Barb. 194.

² *Phoenix v. Clark*, 2 Halst. Ch. 447. 412.

³ *Vervalen v. Older*, 4 Halst. Ch. 98.

⁴ *Coe v. Knox, &c.*, 10 Ohio (N. S.),

⁵ *Campbell v. Macomb*, 4 John. Ch. 534; *Reid v. Bank, &c.*, 1 Sneed, 262.

⁶ *Farrant v. Lovel*, 3 Atk. 723.

(a) In Massachusetts, where a mortgagee has brought a suit for foreclosure or possession, the court or any justice thereof, in term time or vacation, may issue an injunction against waste, done or threatened by the mortgagor, or any person claiming under him, or by his permission. Sts. 1852, 892; Gen. Sts.

§ 40. If after a decree for foreclosure the mortgagor begin to commit waste, he will be restrained by injunction, though no injunction is prayed in the bill.¹

§ 41. Where a mortgagee in fee in possession commits waste by cutting down timber, and the money arising from the sale of the timber is not applied in sinking the interest and principal of his mortgage; the court, on a bill brought by the mortgagor to stay waste, and a certificate thereof, will grant an injunction.²

§ 42. On a sale of mortgaged premises, in a suit to foreclose, if the tenant in possession refuses to deliver them up, the court will grant an order to deliver possession, and, in default thereof, an injunction will issue.³

§ 43. Where a mortgagee has a judgment at law, there need be no decree *in personam* against the mortgagor praying to be permitted to redeem, but the amount to be paid should be fixed by the decree, and, if paid by a certain day, the injunction perpetuated, and the defendant's claim released, and, if not paid, the property should be sold; and where the property was in the mortgagor's hands, if not surrendered to be sold, and the money could not be got from the complainant, the bill should be dismissed, and the injunction dissolved.⁴

§ 43 a. Where mortgaged personal property is delivered to the mortgagee, and there is a continued change of possession, the mortgagee is not entitled to an injunction to restrain a subsequent execution against the mortgagor, as he has a perfect remedy at law.⁵

§ 43 b. So an injunction will not be granted, to restrain a party from selling, on an execution against a mortgagor, personal property mortgaged to the complainant to secure an antecedent debt, where the execution was issued, although not actually levied, prior to the execution of the mortgage.⁶

¹ Goodman v. Kine, 8 Beav. 379.

² Farrant v. Lovel, 3 Atk. 723.

³ Ludlow v. Lansing, Hopk. 231.

⁴ Chaney v. Cooke, 5 Monr. 248.

⁵ Warner v. Paine, 3 Barb. Ch. 630.

⁶ *Ib.*

§ 44. Where a conveyance of land is obtained without deception, but upon a verbal promise subsequently to secure the purchase-money by a mortgage, which the grantee afterwards refuses to do; this will not constitute a sufficient ground for enjoining him from selling the land.¹

§ 44 a. A bill alleged indebtedness to the plaintiff of \$2,045.12, that the debtor had property of about \$20,000 in value, that he had mortgaged the same to secure the sums of \$5,396.72, \$2,567.25, and \$3,100, and had made a sale of a part thereof to secure the sum of \$2,950, which last mortgage and sale were alleged to be fraudulent, without consideration, and made for the purpose of defrauding the complainants; and prayed that the last mentioned mortgage and sale might be declared void, that an injunction might issue, and a receiver be appointed. No proof having been offered of the claims of the complainants except the affidavit of one of them; the mortgagee having answered, upon oath, that the consideration of the mortgage attacked as fraudulent "was true and *bonâ fide*, as therein set forth;" and the property of the defendant being several thousand dollars more than his liabilities, as set forth by the bill: held, that a decree of the lower court, granting an injunction, was erroneous, and must be reversed.²

§ 45. A indorsed for B certain notes given by B in part payment of a steamboat, and B, to secure A, mortgaged the boat, and agreed to insure and assign the policy to A. B afterwards, being in failing circumstances, assigned all his estate, including the boat, to C. A filed a bill in chancery against B and C, alleging the assignment, the insolvency of B, and that he had neglected to insure the boat and assign the policy; that C denied the right of A as mortgagee, claimed an exclusive right to the boat, to enable him to execute his trust, and avowed his purpose to employ and sell it irrespective of A's lien, and that C was unable to make good a loss resulting from the destruction of the boat, or its condemnation, to satisfy the demand of persons furnishing supplies, &c. Held, although

¹ Ellsworth v. Starbird, 32 Maine, 176. ² Nusbaum v. Stein, 12 Md. 315.

neither of the notes was due, chancery would interpose, so as to make the boat subservient to A's lien, upon the principle *quia timet*.¹

§ 46. A, in Mississippi, having made a second mortgage, covering all his property, which was fraudulent on its face, in conveying perishable property to secure a debt on long time, with liberty to A to use a portion of it, and fearing lest his equity of redemption might be sold on execution, sent to Kentucky for his brother-in-law, and sold to him the entire property, amounting to about \$200,000, for the consideration that B would pay the incumbrances, nearly equal to the value of the property. Bill in equity by B, to enjoin an execution afterwards levied on the property. A had retained the property for two years after his conveyance, and B knew his situation, although it was the opinion of a witness, familiar with the parties, that the sale was fair and honest. Held, B stood in no better situation than A, and the bill should be dismissed; and this, although B had subsequently executed his notes to the assignees of the creditors preferred by the mortgages, payable in instalments, for the amount of their respective debts, the assignees retaining the original mortgages for their security.²

§ 47. A bill, setting out a promise by the defendant to give a mortgage of all his stock in trade, and charging that he now refuses to fulfil his promise, and is selling his stock, and the complainant, being a large creditor, fears to lose his security, shows an equitable lien, and will authorize an injunction.³

§ 48. The questions, whether after foreclosure of a mortgage, insufficient in value to satisfy the debt, the mortgagee may maintain an action at law for the balance of the debt, with a deduction of the value of the estate; and whether by the bringing of such action the foreclosure is opened and the right of redemption revived: have given rise to many appli-

¹ Walker v. Miller, 11 Ala. 1067.

³ Trieber v. Burgess, 11 Md. 452.

² Farmers', &c. v. Douglass, 11 S. & M. 469.

cations for the process of injunction. Thus the bill in the original cause by the mortgagee was, that the defendant, the mortgagor, might redeem or stand foreclosed, and there was the common decree of foreclosure ; the defendant not paying the money reported due by the time appointed, he was absolutely foreclosed. The plaintiff, the mortgagee, afterwards sold the estate so foreclosed, and the money produced by the sale not amounting to what was reported on the mortgage, he brought his action against the mortgagor to recover the deficiency. The plaintiff in this suit thereupon brought his bill for an injunction, to stay the defendant's proceeding at law, upon the ground that having got his pledge, he could have no more, and obtained an injunction till answer and further order. Upon showing cause for continuance of the injunction, his Lordship (Lord Thurlow) was clear, that the defendant, the mortgagee, under the mortgagor's covenant in the mortgage deed, was entitled to be paid what was due on the mortgage ; that so long as he kept the estate, he must take the pledge as a satisfaction, because, by not knowing what it would produce, he would not say anything was due, but if he sold the estate fairly, and without collusion, and for the best price, it would then appear whether it produced the amount of the money reported due ; and to the extent of what it did not, the mortgagee had a right, and so it was now established, to bring an action against the mortgagor to recover the deficiency. Injunction dissolved.¹

§ 49. In the case of *Perry v. Barker*,² Lord Eldon intimated an opinion, that a suit would not lie upon the debt after a sale of the land, because the mortgagee no longer had power to reconvey the estate ; but at the same time remarked, that Lord Thurlow had decided that the action might be maintained, either before or after a sale. In a subsequent hearing of the same case, Lord Erskine held, that an action would lie upon the bond after foreclosure ; but the right of redemption was thereby revived, and, if the mortgagee had sold the land, he should be allowed time to get it back. But

¹ *Tooke v. Hartley*, 2 Dick. 785.

² 8 Ves. 527.

where this could not be done, that the suit would be restrained by a perpetual injunction.¹

§ 50. A mortgagee for a long term obtained a decree of foreclosure, took possession, sold the estate at auction, and afterwards called upon the mortgagor for the balance of the debt, with interest from completion of the sale, and brought an action upon the mortgage bond. The plaintiff files a bill praying for redemption and injunction, or that the defendant may be decreed to have elected to take the premises in satisfaction of his debt, to deliver up the bond, and be forever restrained from proceeding against the plaintiff. Lord Eldon said: "No case has been produced, previous to 1786, in which, after a foreclosure, the mortgagee has brought the estate to sale, and afterwards brought an action for the money. That circumstance has some weight. The action in that case must have been for the whole money, for it was an action upon the bond. But consider how it would be if the action was upon the covenant, laying the damages for the remainder of the money. It is not very consistent to say, you open the foreclosure, desiring him to bring in only the remainder of the money; for the consequence of opening the foreclosure would be, that a new account should be taken of the principal and interest; and the money to be brought in upon that footing should be all that is due, or nothing. The case of *Tooke v. Hartley* certainly does not decide this; for the estate, in fact, sold or not, was in the possession of the mortgagee; and if placed in the same situation as if there had been no foreclosure, the estate being in his possession, what was required by justice as to the reconveyance might be done by the court. But where it is sold to a stranger that cannot be. The power of reconveyance is gone, and the mortgagor cannot have the right, if it is to be considered opened. At the same time, I certainly understood Lord Thurlow's opinion to have been, that, whether the estate was sold to a stranger, or remained in the possession of the mortgagee, there was no distinction; but an action might be brought for the difference. That opinion of Lord Thurlow, and the circumstance that this particular case was never decided, make it proper at present to grant the

¹ 13 Ves. 197.

injunction, extending it to stay trial, the plaintiff paying the money into court.”¹ .

§ 51. In the case of *Lockhart v. Hardy*,² the Master of the Rolls expressed an opinion, that equity would enjoin a suit upon the personal obligation for which a mortgage had been given as security, after foreclosure of the mortgage; and refused to let the mortgagee come in under an administration suit, and prove for the deficiency.

§ 52. In *Hatch v. White*,³ Judge Story expresses doubts whether a suit upon the mortgage debt should be enjoined in chancery, until the debt has been fully paid; and also whether the foreclosure is opened by bringing an action for the debt. He remarks, that a foreclosure may properly be regarded as a *purchase*, at the full value of the land, if less than the debt, and, if greater, at the amount of the debt. Where the debt is much less than the value of the land, the mortgage will seldom be foreclosed; hence foreclosure is *prima facie* evidence that the land is insufficient to pay the debt. By taking the land, the creditor suffers an inconvenience. He must lose by any depreciation of value, and therefore he ought to have the benefit of any rise in value. If after foreclosure the mortgagee should go into a court of equity for further relief, he might be held to the rule of reciprocal equity; but this does not justify an injunction against the enforcement of *legal rights*. And even if such injunction should be granted where the estate remains unsold, it would seem that after a sale he ought to recover the balance due. Whatever may be the practice in equity, all the decisions concur in the principle, that *at law* foreclosure of a mortgage is no bar to a suit for the balance of the debt. Judge Story further holds, that whatever rule upon this subject a court of chancery, acting upon its own peculiar principles, may adopt, it will not authorize the opening of a foreclosure, in consequence of a suit upon the bond, where the right of redemption is by statute limited to a certain time after possession taken by the mortgagee.

¹ *Perry v. Barker*, 8 Ves. 528, 531.

² 2 Galli. 159.

³ 9 Beav. 349.

§ 53. Upon the same subject it is remarked by the court in Maryland: "The mortgaged estate is considered as a pledge sufficient for the satisfaction of the debt, and as having been so taken by the parties themselves by the nature of their contract. Therefore if the creditor, on his bill in equity, has a decree to foreclose, and nothing more, he is held to have obtained that kind of satisfaction of his claim for which he stipulated; and if after such a decree he sues upon the bond, he thereby opens the decree, and admits the right of the mortgagor to redeem; because by the institution of the suit he disclaims the satisfaction he had obtained by the decree. And if he has placed it out of the mortgagor's power to redeem, by aliening the estate after the decree, he will be perpetually enjoined from proceeding upon the bond. But if the creditor on his bill in equity, instead of a decree to foreclose, obtains a decree for a sale, and the mortgaged estate sells for less than the debt, the balance may be recovered in an action on the covenant or bond, without opening or affecting such a decree for a sale, by which the pledge itself is not taken as a satisfaction, as by a decree to foreclose."¹

§ 54. After an injunction has been obtained against a mortgagor who is bankrupt, and his assignee and a receiver have been appointed, it is too late to raise any objection to the injunction or receiver, on a motion to apply the rents in the hands of the receiver.²

§ 55. A purchased land of B, and gave his note for the price, payable in instalments, to meet payments to be made on a mortgage upon the land. A failed to pay the note, and the mortgage was foreclosed, and A purchased at the fore-

¹ Per Bland, Chancellor, *Andrews v. Scotton*, 2 Bland, 666. See further, upon the same general subject, though not directly involving the remedy of injunction; *Omalby v. Swan*, 3 Mas. 474; *West v. Chamberlin*, 8 Pick. 336; *Lawrence v. Fletcher*, 8 Met. 165; *Leland v. Loring*, 10 Met. 125; *Capen v. Richardson*, 7 Gray, 364; *Daniels v. Mowry*, 1 R. I. 151; *Bassett v. Mason*, 18 Conn. 131; *Coit v.*

Fitch, Kirby, 254; *McEwen v. Welles*, 1 Root, 202; *Southard v. Wilson*, 29 Maine, 56; *Porter v. Pillsbury*, 36 Ib. 278; *Paris v. Hulett*, 26 Verm. 308; *Langdon v. Paul*, 20 Ib. 217; *Hunt v. Stiles*, 10 N. H. 469; *The Globe, &c. v. Lansing*, 5 Cow. 380; *Osborne v. Tunis*, 1 Dutch. 633; *Hubbel v. Broadwell*, 8 Ham. 120; *Wilson v. Wilson*, 4 Iowa, 309.

² *Post v. Dorr*, 4 Edw. Ch. 412.

closure sale. B recovered judgment on his note. Held, A was not entitled to relief in equity against the judgment.¹

§ 56. An injunction will not be granted to restrain the statute foreclosure of a mortgage, on the ground that an appeal is pending from a decision of the vice-chancellor, dismissing a bill filed by the mortgagor to correct an alleged error in the amount of the mortgage.²

§ 57. An injunction to stay sale, under a power in a mortgage, was granted a few days before the expiration of the notice of sale, on a bill by the mortgagor, charging a parol agreement, enlarging the time of payment, and that payments had been made on the mortgage, which were not credited. After answer, admitting some of the payments, but denying the agreement charged, the injunction was dissolved, on the terms of giving six weeks' further notice of the sale; and a reference to a master was ordered, to ascertain the sum due.³

§ 58. Where, at a sale, under an order of the Probate Court, of mortgaged property, in behalf of the mortgagee, a third party gave notice that the title was in the deceased only in trust for him, and, after it was bid off to the mortgagee and another, obtained an injunction restraining further proceedings, which was served on the chief justice before the confirmation of the sale; the injunction was perpetuated on payment of the mortgage by the plaintiff.⁴

¹ Clark v. Condit, 13 Mis. 222.

² Outtrin v. Graves, 1 Barb. 49.

³ Nichols v. Wilson, 4 John. Ch. 115.

⁴ Fisk v. Wilson, 15 Tex. 430.

CHAPTER XXIX.

CONTRACTS.

1. Mutual engagements.
2. Contract against competition.
3. Remedy in part ; *dramatic* contracts.
8. Railroads.
13. Contracts for the sale and purchase of real estate ; specific performance ; waste, &c.

§ 1. EQUITY sometimes interferes by injunction in case of contracts. In the case of *Mexborough v. Bower*,¹ Lord Langdale, M. R., expressed himself with some surprise and impatience as to the denial in argument of this jurisdiction. "From the course of the argument, one would really think that some doubt had arisen as to the jurisdiction of the court to compel parties to perform their covenants and agreements." (a) Thus where a contract contains mutual stipulations, and one party performs his part, equity may by injunction prevent the other from violating the contract, although it has not been actually violated, if the danger of violation is imminent and actually impending. And although

¹ 7 Beav. (29 Eng. Cha.) 129.

(a) In a late case, an injunction was refused, *against* the completion of a contract made by *auction*. Thompson, C. J., says: "This is not a case for a preliminary injunction. Mooney, the defendant, entered into a contract with the city, on the 29th of September, 1868, which was approved by councils. He positively denies that he was informed of the bid which the complainants made at the first letting, and which they claim became the lowest by reason of the lowest bidder failing to accept and enter into the contract. This would be a most material fact to be established in order to affect him with their equity. That has not been established, and no injunction at this time can issue against him to restrain him from doing the work. To restrain the city officers from estimating or paying for the work, would be in effect to enjoin him, which in the aspect already referred to, of an innocent bidder, without notice, ought not to be done." *Murphy v. City, Leg. Intel.* (Philadelphia).

such contract may be somewhat obscure, the court will struggle hard for its meaning, according to the probable intent of the parties.¹

§ 1 a. But, to justify such interference, there must have been a completed, not merely intended, contract. Thus A was entitled to a money bond, given by B, the two being on the most intimate terms. B was about to marry, and A, being informed of the fact, told him and others, "I will not distress you about the bond — I have given it up — I shall never enforce it;" but, on being requested to give up the bond in fact, she said: "No, I will be trusted, but he may rely on my word." B married. A afterwards married, and her husband and herself put the bond in suit. B filed a bill for an injunction, alleging that he had married on the faith of the promises made by A, and that a part of the consideration for A's promise was the absolute conveyance by B's father, to A, of a house in India, which house he had previously transferred to her by a merely voluntary conveyance. Held, B was not entitled to an injunction; for what passed between the parties was neither a legal contract nor a misrepresentation of facts, but only an expression of intention, the performance of which could not be enforced.² And an injunction will not be granted in aid of a right claimed under an agreement, unless such right is free from doubt, and its violation would be an irreparable injury.³ So where the rights of parties are founded upon an agreement between them; before a decree establishing their rights, equity will not grant an injunction, the effect of which will be to restore the complainant to the possession of premises in the occupation of the defendant.⁴

§ 2. Applications are sometimes made, to enjoin the violation of contracts against following some particular trade or calling. (a) Thus an injunction was granted, to restrain a

¹ *Casey v. Holmes*, 10 Ala. 776.

³ *Morris v. Soc'y*, 1 Halst. Ch. 203.

² *Jorden v. Money*, 31 Eng. Law & Eq. 20.

⁴ *Akrill v. Selden*, 1 Barb. 316.

(a) With regard to the validity of contracts in restraint of trade, see *Alger v. Thacher*, 19 Pick. 51; *Chappel v. Brockway*, 21 Wend. 157; 2 Pars. on Contr. 254 and notes.

solicitor, who had sold his business to the plaintiff for valuable consideration, with an agreement not to practise in Great Britain for twenty years, from thus practising, or seeking to induce clients to cease employing the plaintiff. (In this case Lord Langdale, M. R., carefully analyzes some of the leading cases and approved principles, relating to agreements in restraint of trade.¹)

§ 2 a. Where the defendant, on being articulated to the plaintiff, covenanted not to be concerned for any of his clients, under a certain penalty, and, after admission, violated the covenant; he was restrained by injunction. Lord Langdale, M. R., remarked: "Where an injunction is asked to restrain a party from exercising his professional employment, the court has always had some reluctance in acting, for not only is it, to some extent, a restriction on trade, but it may also have the effect of depriving third parties of the services of those in whom alone they may have confidence. The question has arisen, not only in the case of solicitors, but in that of medical men. There was a case before Lord Eldon, of a medical man who had covenanted not to be employed for certain persons, and those persons being taken ill, it was a case of great hardship to say that he should not attend them. — This court cannot interfere in these cases without the possibility of injury to third parties. That difficulty, however, has been passed over and the court has repeatedly exercised its jurisdiction."

§ 2 b. In the case of *Robinson v. Phillips* (Mass. S. J. C., Suffolk, February, 1868), an injunction was granted against publishing a newspaper, in violation of a contract that the defendant would not thus publish within a certain town. That the *tone* of the paper was changed, was held no defence; nor that the contract was in restraint of trade. The plaintiff was assignee of the defendant's bond.

§ 2 c. The following opinion of Mr. Justice Sharswood upon the general subject is found in a late case in Pennsylvania:² "That contracts restraining the exercise of a trade

¹ *Whittaker v. Howe*, 3 Beav. 395.

² *M'Clurg's, &c., Leg. Intel.* (Philadelphia).

or profession in particular localities are valid, when there is a fair and reasonable ground for the restriction, as in the case of the sale of the good-will of a trade or business, when the vendor covenants not to pursue the same business within certain prescribed limits, is beyond question. The leading case is *Mitchells v. Reynolds* (1 P. Wms. 181), in which C. J. Parker delivered a long and elaborate opinion. The doctrine has been at rest ever since, as Lord Kenyon declared in *Davis v. Mason* (5 T. R. 118), in which a bond by a surgeon not to practice within ten miles of the place where the obligee lived was held good, and a similar undertaking by an apothecary, not to set up the business within twenty miles was sustained in *Hayward v. Young* (2 Chitty, 407). The appellee had therefore a clear legal right under his contract. Ought a court of equity to enforce it by injunction? When Mr. Eden wrote his valuable treatise on the law of injunction, he stated that he had not been able to find any reported cases in which the court had interfered by that process to restrain the breach of such a covenant. He admits, however, that it may be inferred from Lord Eldon's observations in *Crutwell v. Lye* (17 Ves. 335), that there is no reasonable objection to the exercise of such a jurisdiction. (Eden on Injunctions, 223, 224.) In that case, however, there was no contract, but merely the sale of a trade, with the good-will, which, without express covenant, or fraud, was held not to prevent the vendor from setting up the same business. Lord Eldon said, 'A man might stand by and give encouragement, generating a confidence that he would not engage in such a trade, inducing other persons to involve themselves; on the ground of which this court might interpose.' If equity would enforce an implied contract within reasonable limits, *à fortiori* they ought to in the case of an express one. Accordingly several subsequent decisions both in England and America have acted on this principle. *Harrison v. Gardner* (2 Madd. Ch. Rep. 198), was the case of a retiring partner, who according to the statement of the bill had given an assurance verbally that he would not set up in the same line of business in the street in which it had been carried on before, or its immediate vicinity. The vice-chancellor, Sir Thomas Plumer, said, 'Suppose there

was no dispute as to the facts stated in the bill, but that they were admitted, it is clear the court would relieve.' In *Williams v. Williams* (2 Swanst. 253), Lord Eldon granted an injunction in a similar case of a retiring partner, where, however, there was an express agreement in writing. *Butler v. Burleson* (16 Vermont, 176), was like this a contract between two practising physicians, and it was enforced by injunction. 'Where there is an express covenant,' said C. J. Williams, 'and an uncontroverted mischief arising from the breach of it, equity will grant an injunction to restrain the breach. In this case there is an express contract. The mischief arising from the breach of it cannot be repaired, nor can it well be estimated. A suit at law would afford no adequate remedy, and the damages will be continuing and accruing from day to day, and furthermore the object of the contract can only be obtained by the parties conforming expressly, and exactly to its terms. It seems, therefore, to be a very proper case for a court of chancery to enforce the contract, by granting an injunction to prevent the breach of it, according to the acknowledged principle on which courts of equity act in similar cases.' The same doctrine was maintained in *Beard v. Dennis* (6 Indiana, 200). Judge King also recognized it as established in *Palmer v. Graham* (1 Parsons, 476), and awarded an injunction on the ground of the inadequacy of an action at law to give the party aggrieved a full and perfect remedy for such a breach of good faith. We see nothing to distinguish this from the cases cited. It has been objected that the consideration was inadequate. Upon that subject C. J. Tindal, delivering the opinion of the Court of Exchequer Chamber, in *Hitchcock v. Coker* (6 Ad. & El. 438), said: 'If there is no consideration, or a consideration of no real value, the contract in restraint of trade, which in itself is never favored in law, must either be a fraud upon the rights of the party restrained or a mere voluntary contract, *nudum pactum*, and therefore void. But if by adequacy of consideration more is intended, and that the court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon

the court, in every particular case, which it has no means whatever to execute. It is impossible for the court, looking at the record, to say whether in any particular case, the party restrained has made an improvident bargain or not.' This is not like a bill for the specific performance of an unexecuted contract, where, if the bargain is a hard one, or founded on an inadequate consideration, a chancellor will refuse to interfere, but leave the party to his legal remedy. This agreement was fully executed. The appellant removed, and the appellee, on the faith of it, gave up his practice at the place where he was before established, and settled in the new neighborhood. He cannot be put in *statu quo*. We cannot by our decree restore to him the practice he has given up, nor could any damages a jury would give be an adequate compensation. Even if it should be a sum, which would purchase a life annuity equal to his former income, that would not provide for that increase from year to year which enlarged experience and widening reputation would, in all probability, have insured to him had he remained where he was. The appellant has returned and established himself within the prescribed limits in violation of his agreement. It was said that he did not mean to interfere with the appellee's practice; but how can he well avoid it if he is called upon by his old patients and others? It was with a view to this that the contract stipulated that he should not establish himself in the practice of his profession within twelve miles. This distance was doubtless named, because it was considered sufficient to render the practice, in the appellant's old circle, reaching a distance of five or six miles on either side, secure to the appellee. We agree with the court below that such a restraint is not unreasonable; not greater than the appellee's protection may require."

§ 3. In *Whittaker v. Howe*,¹ Lord Langdale, M. R., said: "I do not think that this court can refuse to grant an injunction to restrain the violation of a contract or covenant, because there may be some part of the agreement which the court could not compel the defendant specifically to perform."

¹ 3 Beav. 395.

Thus where a contract contains covenants to do certain acts, and also to abstain from doing certain other acts, the court has jurisdiction to restrain the breach of the negative covenants, though there may be no jurisdiction to specifically perform the affirmative covenants. But in such cases the court will decline to interfere, where the jurisdiction cannot be beneficially exercised, or where its exercise would work injustice; as in a case where the consideration for the negative covenant of the one party is the affirmative covenant of the other party, which latter the court cannot specifically perform.¹

§ 4. This general rule, with the modifications growing out of special circumstances, has been several times illustrated by cases arising between *dramatic managers and performers*. The extravagant prices commanded by popular actors, and the large profits from crowded houses still remaining to their employers after successful engagements, seem to have held out a temptation too strong to be resisted, to violate and procure the violation of the most formal and positive engagements, to perform for a specified time at one theatre, and not to perform at any other.

§ 5. In a case often cited, A agreed in writing with B, that, for certain considerations therein expressed, she would sing and perform at his theatre for a specified period; and that during her engagement with B she would not sing elsewhere without his license in writing. Afterwards A contracted with C, to sing and perform at his theatre during this period. Upon bill by B, praying simply that A might be restrained from singing and performing elsewhere than at his theatre during the period specified, the court granted an injunction accordingly. In this case² it was contended, that the court ought never to grant an injunction, except in cases connected with specific performance, or where, if forbearance to do an act is the object, the injunction will execute the whole of the agreement or all that remains to be performed. After commenting

¹ *Kemble v. Kean*, 6 Sim. 333; *Kimberley v. Jennings*, Ib. 340. See 5 Law J. Rep. (N. S.) Chanc. 115; *Collins v. Plumb*, 16 Ves. 454; *Hills v. Croll*, 2 Phil. 60; 14 Law J. Rep. (N. S.) Chanc. 414.
² 13 Eng. Law & Eq. 255.

at length upon the leading cases cited, the Lord Chancellor remarks: ¹ “What is the principle of the jurisdiction of the court? That principle is to bind men’s consciences to a fair and liberal performance of their agreements. — It enforces, where it can, the literal performance of the contract. It is objected that if I refuse this application, I exclude this lady from performing at Covent Garden, when I cannot compel her to perform at the Queen’s Theatre. I cannot compel her to perform of course. — But what cause of complaint is it that I should prevent her from doing an act which may compel her to do what she ought to do? Though that is not the object the court has in view; for the court cannot indirectly do a thing, and I disclaim doing a thing indirectly which I cannot do directly. — Though I cannot compel the execution of the whole of the contract, I leave nothing unaccomplished by my order which I hold it is in the power of the court to accomplish. She will be committed to prison by this court if she does any act in breach of this injunction; and it will have this effect: by preventing her from doing the act, there will be no case, in an action by Mr. Lumley against her, for such an amount of vindictive damages as a jury might probably be disposed to give if she exercised her talents in the rival theatre. I shall merely carry out, as far as I can, the whole power of the court on one subject, which fortunately has a bearing upon another subject which I cannot directly touch.” ²

§ 6. It was agreed, in February, 1828, between the plaintiffs, proprietors of Covent Garden Theatre, and the defendant, a celebrated actor, that he should act for twenty-four nights, at a salary of £50 for each night; beginning the 1st of October, and concluding before Christmas; that he should give them the preference in the renewal of an engagement, and during his engagement should not perform at any other theatre in London. He acted sixteen nights, but, in consequence of an accident to the gas-works in the theatre, could not complete his engagement before Christmas. The parties then agreed for twelve nights after Christmas, instead of the

¹ 13 Eng. Law & Eq. 257.

² Lumley v. Wagner, 13 Eng. Law & Eq. 252-5.

remaining eight, upon the same terms. He acted on two nights, and was to have acted on a third, but was unable to appear. Soon afterwards, he having expressed a wish to suspend his performance in London and retire into the country to recruit his health and study some new parts; the plaintiff, Kemble, informed him by letter, dated January 21, 1829, that they consented, it being understood, that he would be ready, at the commencement of the season 1830-1, to return, when required, to his engagement—ten nights still remaining—and that in the mean time he was not to act in London. January 22, he, by letter, accepted these proposals. In November, 1830, he returned to London, and soon afterwards engaged to act at Drury Lane Theatre. Whereupon the plaintiffs file a bill for specific performance and for injunction. Lord Lyndhurst granted an injunction, restraining the defendant from acting in London, till he should have acted ten nights at Covent Garden. But, on motion, the injunction was dissolved. Sir J. Chadwell, V. C., says: “Independently of the difficulty of compelling a man to act, there is no time stated, and it is not stated in what characters he shall act; and the thing is, altogether, so loose that it is perfectly impossible for the court to determine upon what scheme of things Mr. Kean shall perform his agreement. There can be no prospective declaration or direction of the court, as to the performance of the agreement; and, supposing Mr. Kean should resist, how is such an agreement to be performed by the court? Sequestration is out of the question, and can it be said that a man can be compelled to perform an agreement to act at a theatre, by this court sending him to the Fleet for refusing to act at all? There is no method of arriving at that which is the substance of the contract between the parties, by means of any process which this court is enabled to issue; and, therefore (unless there is some positive authority to the contrary), my opinion is that, where the agreement is mainly and substantially of an active nature, and is so undetermined that it is impossible to have performance of it in this court, and it is only guarded by a negative provision, this court will leave the parties, altogether, to a court of law, and will not give partial relief by enforcing only a negative stipu-

lation.” The vice-chancellor proceeds to distinguish between this case and one of *partnership*, in which, under similar circumstances, the court would interfere by injunction. He refers particularly to the case of *Morris v. Colman*,¹ and the following account of it, given by Lord Eldon in a subsequent case: “*Morris, Colman, and other persons were engaged in a partnership in the Haymarket Theatre, which was to have continuance for a very long period, as long, indeed, as the theatre should exist. Colman had entered into an agreement which I was very unwilling to enforce, not that he would write for the Haymarket Theatre, but that he would not write for any other theatre. It appeared to me that the court could enforce that agreement by restraining him from writing for any other theatre. The court could not compel him to write for the Haymarket Theatre; but it did the only thing in its power, it induced him, indirectly, to do one thing by prohibiting him from doing another. There was an express covenant on his part contained in the articles of partnership.*”²

§ 7. In a case in Maryland, where the defendant contracted that his wife should perform at the theatre of a certain manager, for a specific time and salary; held, a court of equity would not enjoin the wife from performing elsewhere during that time; nor the husband from permitting her to change her abode; nor another manager from employing her; more especially pending a suit at law upon the contract.³ And the same rule was adopted in another case, in New York, where a person contracted to sing at operas, &c., and not to make other engagements for the same purpose; that an injunction will not be granted to restrain the contractor from making such other engagements; the party was left to his remedy at law.⁴

§ 8. Contracts relating to *railroads* have sometimes been the subjects of application for injunction.⁵

¹ 18 Ves. 437.

² *Kemble v. Kean*, 6 Sim. 333.

³ *Burton v. Marshall*, 4 Gill, 487.

⁴ *Sanquirico v. Benedetti*, 1 Barb. 315.

⁵ See *Niagara, &c. v. Great, &c.*, 39 Barb. 212.

§ 9. Where there is an agreement between two railway companies, which is beyond the powers of both, and against the policy of their acts of Parliament, a shareholder in one of the companies may file a bill, on behalf of himself and all the other shareholders therein, against his own company and the other company, for an injunction to restrain the execution of the agreement, and without making either the directors of the former company, or the shareholders therein who promoted the agreement, or any of them, defendants to the suit.¹

§ 10. In the case of the Great Western, &c. v. The Birmingham, &c. (Railways), the defendants had entered into a contract to sell their railway to the plaintiffs, and the bill was filed for specific performance. And it alleged that the plaintiffs were obliged to take such proceeding, because the defendants, contending for the invalidity of their contract with the plaintiffs, were proceeding to contract for a sale to the Northwestern Company; and the bill prayed for an injunction against such contract, or any proceedings inconsistent with the rights of the plaintiffs, without their consent. Injunction granted.² But notwithstanding this case, in *The Shrewsbury, &c. v. The Shrewsbury, &c.*, the vice-chancellor declined to interfere by injunction under circumstances thus stated: "They (the defendants) are proposing to enter into a contract with the London and Northwestern Company, under which the latter bind themselves to pay to them a sum which amounts to £40,000 or £50,000 a year for twenty-one years. Supposing it were to turn out, in the result, if I were to issue this injunction, that the defendants are right, and that the agreement which the plaintiffs have entered into is invalid *in toto*, and therefore there was no legal bar to the defendants entering into this contract, in what predicament would this court then find itself, if it should have issued an injunction restraining the defendants from entering into a contract *ex hypothesi* a valid contract, which there was no legal ground to

¹ *Winch v. The Birkenhead, &c.*, 13 Eng. Law & Eq. 506. *The Shrewsbury, &c.*, 1 Sim. N. S. 428.

² (Cited in) *The Shrewsbury, &c. v.*

prevent them from entering into, and then afterwards they should be unable to enter into it, and so lose £50,000 a year for twenty-one years.”¹

§ 11. In the same case, the vice-chancellor made the following general remarks.

§ 12. “I do not mean to say that this court will not, under some circumstances, prevent parties, pending litigation, from alienating, or even entering into contracts relating to subject-matters of litigation. By such alienations or contracts no eventual injury can, in general, result to the plaintiff; but they may impose on him the necessity of making additional parties, and may delay and embarrass him in the assertion of his rights. In some cases they might even tend to destroy the subject-matter in dispute. — But this interference is by no means a matter of course. — There are, I apprehend, two points on which the court must satisfy itself. First — not that the plaintiff has, certainly, a right, but that he has a fair question to raise as to the existence of such a right. — There is a further question, namely, whether interim interference, or a balance of convenience and inconvenience to the one party and to the other, is or is not expedient. Where the alternative is interference or probable destruction of the property, there, of course, the court will be very ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may eventually turn out to be a legal right of the defendant. But where, on the other hand, the only evil to result from non-interference is, that the plaintiff may, by the contracts or deeds of the defendants, be retarded or embarrassed by his litigation, there the court will be far more ready to listen to any suggestion of the defendant, showing that interference during litigation will prejudice his rights.”²

§ 12 a. A executed a conditional note to a railroad company. B, an assignee, brought suit on the note, alleging per-

¹ 1 Sim. 430.

&c. v. The Shrewsbury, &c., 1 Sim. N.

² Per Vice-Chanc., The Shrewsbury, S. 424, 426.

formance of the conditions. A put in a general denial, and judgment was rendered against him. The record of the case contained an agreement between A and the company, to the effect, that the consideration of the note was an agreement by the company to build a switch, which was not fully completed, that the company should finish it, that it should be permanent, and that this agreement should be made a matter of decree. The company took away the part of the switch already completed, and became insolvent and unable to build it. Held, A was not entitled to an injunction of the judgment, because of his laches in not availing himself of his defence in the suit on the note.¹

§ 13. Injunction is often applied for, in connection with contracts for the sale and purchase of real estate. In case of a mere agreement to convey, defect of title is ground for injunction in favor of the purchaser.² And though the sale is under a decree, equity cannot make a man take a title which he is to support by a bill for an injunction.³

§ 14. The remedy of injunction is more especially invoked in connection with the claim for *specific performance*. Upon this subject, a writer of high authority lays down the following general propositions.

§ 15. "If a bill be filed for a specific performance, the court will enjoin either party not to do any act to the injury of the other. Therefore, if the purchaser is in possession, and has not paid the money, the court will grant an injunction against his cutting timber. So, on the other hand, the vendor will be restrained from conveying away the legal estate in the property, because such a measure might put the purchaser to the expense of making another party to the suit; and *a fortiori* he will be restrained from selling the estate to a third person. But in *Spiller v. Spiller* the Lord Chancellor expressly laid it down, that, upon a bill filed for specific performance, he

¹ *Hardy v. Stone*, 23 Ind. 597.

² Per Lord Rosslyn, *Shaw v. Wright*,

³ *Buchanan v. Alwell*, 8 Humph. 3 Ves. 22. See chapters 14, 28. 516; *Buchanan v. Lorman*, 3 Gill, 51.

wished it to be understood, that the court would not take from a seller the disposition of his property. So injunctions may be granted against the agents of the parties. But an injunction will not be granted against a person who is not a party to the suit; and in a late case, upon a bill filed by a seller for a specific performance, and an injunction against the purchaser's proceeding at law to recover the deposit from the seller's attorney, to whom it was paid, *Sir John Leach, V. C.*, refused the motion, with costs, because the attorney was not a party to the suit. But in a later case, the same judge granted an injunction to restrain the purchaser from proceeding in an action against the auctioneer, although he (the auctioneer) was not a party to the suit; the seller offering to bring the deposit into court. Pending a suit by a purchaser for a specific performance of an agreement to sell a presentation to a living, the seller may be restrained by injunction from presenting, and the bishop from instituting, or in the case of a lapse from collating to the living any clerk not named by the purchaser."¹

§ 15 a. Where a bill has been brought for specific performance, and a decree made and complied with, and the plaintiff in such bill brings an action at law for damages caused by delay in performing the contract; the defendant cannot have an injunction in the original cause, though he might in a new suit.²

§ 16. Pending a suit by the vendor for specific performance, equity will not enjoin an action of the purchaser for the deposit, unless the former consent to its being brought into court.³ Excepting, however, the case where the vendor retains the estate from the fault of the purchaser; as where the former is able to make a good title, and the latter refuses to complete the purchase.⁴

§ 16 a. After a decree for specific performance, the defend-

¹ 1 Sugd. on Vend. & P. 289.

² *Ford v. Compton*, 1 Cox, 296.

³ *Tanner v. Smith*, 4 Jur. 310; *Annesley v. Muggridge*, 1 Madd. 593.

⁴ *Wynne v. Griffith*, 1 Sim. & St. 147.

ant cannot proceed by action at law on the contract for damages. The vice-chancellor says: "My decree proceeds upon the ground that the defendant has dispensed with the time stated in the contract. If the plaintiff in equity had before the decree applied for an injunction to restrain the defendant from proceeding in an action at law to recover damages, I should, upon the same principle, have then granted the injunction; and *à fortiori*, I must grant it now. The proceeding at law is inconsistent with the decree in equity."¹

§ 16 b. Where a bill by a seller for specific performance is dismissed, and without the proviso that it shall not prejudice the plaintiff's remedy at law; equity will in a proper case restrain the seller from afterwards bringing an action for damages. For example, where the bill was dismissed because the seller had no title.²

§ 17. If objections arise to the title, and the vendee brings an action at law for non-performance of the agreement, and the vendor files his bill for a performance in specie, and an injunction is granted; the court will not dissolve it without the master's report as to the title, where the action is brought on the ground of want of title.³

§ 18. In case of sale by auction, if both parties claim the deposit, the auctioneer may file a bill of interpleader, and pray for an injunction, which will be granted upon payment of the deposit into court.⁴

§ 19. As has been seen (p. 625), an injunction lies, to restrain the vendor of real property, defendant in a bill for specific performance, from conveying the estate, upon the ground that the plaintiff might be thereby subjected to the expense of making an additional party, when the cause might be just ready for a hearing.⁵

¹ Reynolds v. Nelson, Madd. & Geld. 290.

² McNamara v. Arthur, 2 Ball & B. 349; 1 Sugd. Vend. & P. 497.

³ 1 Sugd. on Vend. & P. 490.

⁴ Farebrother v. Prattent, 5 Price, 303.

⁵ Echliff v. Baldwin, 16 Ves. 267.

§ 20. Equity will enjoin the cutting of timber by one who has got possession under articles to purchase.¹ So a purchaser, under a decree of the court of equity, by the purchase submits himself to the jurisdiction of the court, and, therefore, if he obtain possession before completion of the contract, he may be enjoined from the commission of waste.²

§ 21. In case of a covenant by a purchaser, restricting the mode of enjoyment of the purchased estate, equity will not enjoin a breach of such covenant by a second purchaser without notice; nor where no real injury is likely to arise; or there has been a change of circumstances. And an injunction against the erection of buildings was refused, where the plaintiff had himself erected buildings, which defeated the object of the covenant.³ So the plaintiff, a vendor of land in plots, which formerly constituted one estate, took from each purchaser a covenant to build only in a certain way; but made no objection to important breaches of such covenant on the part of some of the purchasers, not including the defendant. The form of covenant was not only with him, but of each purchaser with all the others. The defendant became a purchaser and executed the covenant after breaches had been committed. Held, a bill for injunction could not be maintained. Sir W. Page Wood, V. C., remarked: "A vendor in such a case is stipulating not only for his own benefit, but for that of all the tenants in his neighborhood. As a *quasi* trustee for them, therefore, he is bound to enforce the covenant as much against one as against the other. — Here is a common scheme, and it is one thing to say that parties may pursue any remedy they may be entitled to at law, and another thing to say that this court will grant specific performance of an arrangement which can only be carried out in part. — The common arrangement has been put an end to, and the beauty which arises from uniformity of design destroyed. — The thing must either be enforced *in toto*, or not at all. The defendant — has a right to say: 'This common

¹ Crockford v. Alexander, 15 Ves. 138; Baldwin v. Belcher, 1 J. & Lat. 18.

² Cassamajor v. Strode, 1 Sim. & St. 381.

³ Bedford v. British, &c., 2 My. 552.

scheme of building has not been preserved.' I cannot say that I think the defendant has put himself into the position of a person who says: 'I will waive all these breaches, and submit myself voluntarily to the terms of a new contract.'"¹

§ 21 a. But, on the other hand, the plaintiffs sold certain property, under a covenant that it should not be used as a public house or beer-shop. A, one of the defendants, afterwards purchased a house, being part of this estate, and built a shop in the rear, and on the 11th of February, without consent, though without interference of the plaintiffs, opened it as a beer-shop. In June, he leased the shop to B, a co-defendant, who carried on the business with A's consent but not the plaintiffs', who, July 8th, served him with notice to desist. The purchaser of another house had, without consent, but without interference of the plaintiffs, also opened a beer-shop in the rear. August 1, the plaintiffs file a bill for injunction. Held, the facts did not show such waiver and acquiescence as would debar them from maintaining the suit.²

§ 21 b. In a case where the plaintiff had contributed to a fund, on condition that a literary and theological seminary should be permanently located at a specified place, which was accordingly done; an injunction was granted against an unauthorized and illegal removal.³

§ 22. An injunction will lie against a purchaser, on behalf of creditors, to restrain payment to the heir.⁴

§ 23. Where the defendant is in Maryland, but the land in controversy is in Virginia, and it is sought to vacate a decree in Virginia; though this cannot be done, yet the defendant, seeking to enforce such decree, may be enjoined from accepting a conveyance of lands purchased by him under it, or, if he has inequitably obtained title, may be decreed to reconvey.⁵

¹ *Peek v. Matthews*, Law Rep. (Eng.) Eq., April, 1867, pp. 514-7-8.

² *Mitchell v. Steward*, Law Rep. (Eng.) Eq., April, 1866, p. 541.

³ *Hascall v. The Madison, &c.*, 8 Barb. 174.

⁴ *Green v. Lowes*, 2 Bro. C. 217.

⁵ *Buchanan v. Lorman*, 3 Gill, 52

CHAPTER XXX.

NEGOTIABLE INSTRUMENTS.

§ 1. In reference to the remedy of injunction as applied to written instruments, Judge Story remarks: "A question has often occurred, whether, if the instrument be void, and ought not to be enforced, the more appropriate remedy in a court of equity would not be, to order a perpetual injunction to restrain the use of the instrument rather than to compel a delivery up and cancellation of the instrument."¹ And it is said by the same eminent jurist in a case which came before him as a judge: "Thirty years ago, it seems to have been thought by Lord Eldon, that an injunction to restrain the negotiation of a negotiable instrument was an extraordinary interference of the court, and that, upon the coming in of the answer, the case stood exactly as if the case had been upon the common injunction to stay proceedings at law."² But this doctrine has been since completely abandoned; and in *Hood v. Astor*,³ Lord Eldon himself, adverting to the supposed practice, not to interfere in cases of negotiable securities to prevent their negotiation, said: 'I do not recollect such a doctrine to have been at any time in my experience the law of this court.' This last doctrine has been in the fullest manner recognized and acted upon by the Supreme Court of the United States."⁴ Thus an absolute note was given, but from a memorandum made at the time, and accompanying circumstances, it appeared that the note was to be collected only on a contingency which had not occurred. Held, equity ought to grant relief.⁵ So an injunction lies, to restrain the holder of a note made in connection with a marriage brocage contract from putting it in

¹ 2 Story, Eq. 10, § 698.

² *Berkeley v. Breymer*, 9 Ves. 355, Sumn. 76.
356.

³ 1 Russ. 412.

⁴ Per Story, J., *Poor v. Carleton*, 3

⁵ *Clayton v. Lyle*, 2 Jones, Eq. 188.

circulation, and thus depriving the maker of the right of making such defence against an indorsee.¹ So A and B purchased from C a plantation and slaves, and executed to him their notes, and a deed of trust on the property, to secure them. C assigned a part of the notes to D, in trust, to secure certain debts to sundry creditors. C became the *bond fide* holder of a portion of the debts, to secure which, the notes were assigned by C to D. D sued A and B on the notes. Held, a court of chancery, on a bill filed by A and B against D, would restrain him from collecting out of them such portion of the notes, as, when collected, D would have to pay over to A.² So when a party, liable over as transferrer of a note, is notified of a plea of failure of consideration filed by the maker, in a suit brought by the transferee thereon; the transferrer is a privy in law to the judgment rendered against the plaintiff on such a plea, and is concluded thereby; and if afterwards the transferrer is proceeding at law to enforce security against the transferee, taken in payment for the note, equity will relieve the transferee to the extent of such failure of consideration, by injunction and decree.³ Though equity will not restrain an action on a note or bill, where the failure of consideration is unliquidated.⁴ And, in general, equity will enjoin the transfer of a specific thing, which, if transferred, will be irretrievably lost; as in this case of negotiable securities, and stocks.⁵ So where a person has negotiable securities in his possession, under a void contract, and is not of sufficient responsibility to answer for the value thereof, the negotiation of them may be restrained by injunction.⁶ So a State court of chancery has jurisdiction to grant an injunction, at the suit of another State, to restrain the transfer, within the former State, of negotiable securities issued by the latter.⁷ So if a note be given by a person immediately on his coming of age, for extravagant supplies made to him during his infancy; the negotiation may be restrained by injunction.⁸ So when a bill or note has been obtained fraudulently, or upon

¹ Smith v. Haytwell, Ambl. 67.

² Nelson v. Dunn, 15 Ala. 501.

³ Bullock v. Winter, 10 Geo. 214.

⁴ Glennie v. Imri, 3 Y. & Coll. Exc. 436.

⁵ Osborn v. Bank, &c., 9 Wheat. 738.

⁶ Delafield v. Illinois, 2 Hill, 159.

⁷ Delafield v. Illinois, 26 Wend. 192.

⁸ Brook v. Galby, 2 Atk. 34.

an illegal transaction, as at play; upon a bill filed charging these facts, supported by an affidavit, an injunction to prevent the negotiating or parting with the bill or note will be granted immediately upon filing the bill, and even before the service of the subpoena to appear.¹ So, in Louisiana, if the plaintiff came improperly into possession of a note, which was left conditionally with a third person, the defendant's remedy is by injunction, not by an appeal from the order of seizure and sale.²

§ 2. The orators, with their father, executed a promissory note to the defendant, the orators signing as "sureties," under an agreement that the note should not be delivered, nor become operative, until certain conditions were performed by the defendant. The father mortgaged certain premises to secure the note; but the defendant, without the consent of the orators, obtained the note and mortgage, and then refused to perform the conditions. Held, the defendant should be enjoined from negotiating or enforcing the note as against the orators. But, the father having deceased, and his personal representative not being a party to the bill; held further, the court could not, upon this bill, interfere, to set aside the note and mortgage, as against his estate.³ So if one, to whom negotiable paper has been confided for a special use or limited purpose, should attempt, in breach of the confidence reposed in him, to pervert the paper to a different use or purpose, equity will, upon proper application, enjoin him from doing any act, though it be the carrying on of a suit at law, which he may make the means or instrument of his bad faith; and indorsees of the paper, after it is overdue, though for value, are subject to the same equities, and may be prevented in the same mode from misapplying it. And where one of several notes, on demand, with interest, given by a corporation before it had issued stock certificates to its stockholders, in evidence of their proportionate interest in certain of its own stock held by it in trust for them, and upon which no money was to be

¹ 4 Bouv. Inst. 128.

³ Chase v. Torrey, 20 Vt. 395.

² Weems v. Ventress, 14 La. An. 267.

paid, was negotiated for value by a stockholder, thirteen months after its date; held, such note was overdue at the time it was taken by the holder, so as to entitle the corporation to enjoin a suit at law commenced by him to recover the amount of the note from them, upon the ground of the equities subsisting between them and the payee of the note.¹

§ 3. The plaintiff, member of a corporation in Oregon, agreed to make a loan to the company, who agreed, upon his request, to give their note therefor, secured by mortgage of their whole property. The plaintiff, then in Oregon, thereupon drew sundry drafts on A, his agent in Connecticut, for about half the amount of the loan, and delivered them to the company. The drafts were forwarded to Connecticut, and accepted by A. A part were paid by A, when due, but one was protested for non-payment, A having been unable to dispose of certain property of the plaintiff in his hands in season to meet it, and it was returned to the president of the company. The company soon after failed, and could not give the promised security; and the plaintiff made no further advance. He also notified A not to pay the draft, and demanded it of the company, but the directors refused to surrender it. Afterwards, while the draft was in the hands of the president, B, a creditor, member, and director of the company, knowing all the facts, attached the draft, with other corporate property, and the president thereupon, on his demand, delivered it to him. B sent the draft to C, whom he owed, to collect and apply the proceeds on his account, and C brought a suit upon it in Connecticut against A. A then had funds of the plaintiff, with which he intended to pay any judgment which C might recover. The plaintiff brings a bill in equity against C for an injunction of the suit, and cancellation of the draft. Held, even if the plaintiff would have a good defence at law, he was entitled to a cancellation of the draft, because other suits might be brought upon it. Also, that, as the company had become unable to give the stipulated security, the plaintiff was not bound to complete the loan, or demand the security. Injunction granted.²

¹ *Atlantic, &c. v. Tredick*, 5 R. I. 171. ² *Ferguson v. Fisk*, 28 Conn. 501.

§ 3 a. A owned property subject to a lease to B, who secretly confederated with and employed C to represent to A that the property was of great value, and that he would purchase it at much more than its real worth if A would buy up the lease of B. Influenced by this fraud, A purchased of B the lease at an exorbitant price, immediately after which C absconded without purchasing the property. A paid B for the lease in two notes, one of which B sold to D, who bought it in good faith and without any knowledge of any defence to it, and paid therefor partly in money and partly in his own note to B, which he subsequently paid. Before D paid this note, however, A notified him that his note held by D was obtained from him by fraud, and that he should not pay it. Held, that this information was not sufficient to throw upon D the risk of refusing to pay to B the balance due upon the purchase of the note, because, under the circumstances, D could not have obtained satisfactory information whether B had defrauded A or not, by an investigation conducted in the usual course of business; it having required, in order to settle that question, a long litigation, in the course of which a jury had failed to agree upon it. Held, therefore, that A was liable to pay to D the note transferred to him by B; but not the other note retained by him, the prosecution of which was accordingly enjoined.¹

§ 4. An injunction in force against the negotiation of a note does not destroy its negotiability.²

§ 4 a. A accepted a bill for £150, drawn by and for the accommodation of B. B indorsed the bill, and, to facilitate its being discounted, procured the indorsement of C. Before maturity, B delivered the bill to D, as security for £100. When the bill fell due, D demanded the sum loaned, and, some weeks afterwards, C took up the bill and gave a new one for £160, upon a further advance of £50. C then brings an action against A upon the bill, and A files a bill for injunction, and to have the bill delivered up. Held, the case was one exclusively for a court of law, and a common injunction,

¹ Adams v. Soule, 33 Vt. 538.

² Winston v. Westfeldt, 22 Ala. 760.

obtained by the plaintiff, should be dissolved.¹ So where a person has lent his name as maker of a note, to enable the borrower to keep up a false credit by using the paper as business paper, he cannot come into court for relief against the consequences.²

§ 5. Bill for a perpetual injunction of judgments, obtained on bills of exchange drawn by the complainant, and passed by the respondent into the hands of third persons, by whom the judgments were obtained. Held, the injunction ought not to be decreed, until the answers of the third parties had come in, although the bill stated, and the respondent admitted, that he paid the judgments, and was the only person interested in them; because such statements and admissions might be made by collusion.³

§ 5 a. The defendants, a bank, agreed with A, of New York, that they would once in each week assort and make up into a package all the bills of the plaintiffs, a bank, which should be in possession of the defendants, and direct them to A, and hold them subject to his order, or deposit them, as he should direct. A agreed, that, at the time of such making up, the defendants might draw on him for the amount, payable in New York, at ten days, and that he would accept the drafts, at the same time directing the packages to be deposited in the B bank, Albany. The arrangement went on, until June 22, 1819. June 25, the defendants refused to take any more bills, having bills to the amount of \$10,150, which A assigned to the plaintiffs, with notice to the defendants, — for part of which amount the defendants had drawn on A, who accepted their drafts; but payment of them was not alleged. The plaintiffs file a bill, praying a delivery of the bills to them and an injunction against their circulation, or a demand for their payment. Held, where a claim is suspended by the promise of a third person, it revives upon his default, and the agreement did not discharge the plaintiffs' obligation to pay,

¹ *Hammon v. Sedgwick*, 6 Hare, 256.

³ *Marshall v. Beverley*, 5 Wheat

² *Davenport v. City Bank*, 9 Paige, 313.

but merely suspended it for ten days after the acceptance of their drafts by A. And the injunction was accordingly refused.¹

§ 6. Judgment was recovered by the holders of a bill of exchange against an indorser, who filed a bill to enjoin it, alleging that the bill had been paid by a subsequent indorser, which payment was not known to the complainant until after the judgment was recovered; that it was paid out of funds furnished by the drawer; and that the suit was brought in the name of the holders, fraudulently, to deprive the complainant of a good defence against the indorser, who paid the bill. Held, on demurrer, that the indorser, who paid the money, was not a necessary party to the bill; that it was not necessary to set out particularly the nature or amount of the funds furnished by the drawer, or whether any or what part were applied to the payment of the bill.²

§ 6 a. A, the acceptor of a bill, who had through B, the drawer, as his agent, paid the bill to C, an indorsee for value, without taking it up, brings a bill against C and D, a subsequent indorsee, charging that C had indorsed the bill to D without value, in order to obtain another payment of it, and praying an injunction against an action commenced, and that the bill be delivered up, to be cancelled. Held, on demurrer, B need not be made party to the suit; the demurrer admitting the allegations of the bill, even as to B, though not a party, and such allegations showing that B had no remaining interest in the case.³

§ 7. Two notes, given for the purchase-money of two distinct tracts of land, but bearing date and executed on the same day, do not thereby become parts of the same transaction, nor so blended together, that an eviction from one of the tracts will enable the vendee to enjoin the collection of the note given for the other.⁴

¹ *Washington, &c. v. The Farmers', &c.*, 4 John. Ch. 63.

² *Atkins v. Dicks*, 14 Pet. 114.

³ *Earle v. Holt*, 5 Hare (26 Eng. Cha.), 180.

⁴ *Wray v. Furniss*, 27 Ala. 471.

§ 8. A and B gave a bond for title to land to C, who paid a part of the purchase-money, and gave his notes for the balance, three to A and three to B. C being unable to pay, it was agreed between the parties, that the contract should be rescinded, and the bond was surrendered, and A and B delivered to C his notes, except one which A had assigned to D. On this note D afterwards recovered judgment against C, who filed a bill to enjoin its collection, making A and D parties. Held, B was not a necessary party; that C was not entitled to an injunction against D; and, the contract having been rescinded, A would be liable to C for the note he had assigned, whenever C should pay the judgment, or A should be otherwise released from his liability to D.¹

§ 9. Chancery will take jurisdiction and grant relief where a promissory note has been lost or destroyed, if the complainant tenders adequate security against loss to the defendant; otherwise he will be turned over to the courts of law.²

§ 10. An assignee of a note brought trover, in the name of the assignor, husband of the payee, for a conversion prior to the assignment. On a bill by the payee against the assignor, her husband, claiming the notes, and for a stay of the suit at law; it was held, that the assignee need not be made a party, as he had no right to commence such suit.³

§ 11. The drawer of a bill cannot enjoin an innocent holder from collecting it of an accommodation acceptor, on the ground of fraud in the payee.⁴

§ 12. Where A bought an inland bill of exchange, *bona fide* and in the regular course of business, but without indorsement from B, the payee, and brought a suit at law in the name of B, to his use, against C, the drawer; held, although C and B both alleged the instrument to be forged, that, on B's receiving from A a bond to indemnify him, he would be restrained from dismissing the suit, and that C would be restrained from

¹ Drake v. Lyons, 9 Gratt. 54.

² Ross v. Wright, 12 Geo. 507.

³ Chase v. Chase, 1 Paige, 198.

⁴ Winn v. Wilkins, 35 Miss. 186.

using a release in that court, until the question as to the genuineness of the paper might be tried.¹

§ 13. Affidavits are not admissible in support of an injunction against the negotiation of a bill. Lord Eldon makes the distinction, that "in the case of waste, the irreparable mischief is not with reference to the circumstance whether the man can or cannot pay, but in this respect, that the timber cannot be set up again."² (a)

¹ *Dibble v. Scott*, 5 Jones, Eq. 164.

² *Berkeley v. Brymer*, 9 Ves. 354, 355.

(a) As to the delivering up of papers to be cancelled ; see *Minshaw v. Jordon*, 3 Bro. 18, n. ; *Hamilton v. Cumming*, 1 John. Ch. 521 ; *Bromley v. Holland*, 7 Ves. 3 ; *Apthorpe v. Comstock*, 8 Cow. 386 ; 2 Paige, 482 ; *Loomis v. Cline*, 4 Barb. 453 ; *Harrington v. Bigelow*, 11 Paige, 349.

APPENDIX.

STATUTES — UNITED STATES — MASSACHUSETTS.

By act of Congress, March 2, 1793, § 5, no injunction can be granted to stay proceedings in a State court, nor in any case without reasonable notice.¹

By act of February 13, 1807, the same power is given to judges of the District Courts to grant injunctions as is exercised by judges of the Supreme Court, subject to the rules prescribed by the judiciary acts. But no injunction, unless so ordered by the Circuit Court, shall continue beyond the next circuit. And a district judge shall not grant an injunction, where there has been reasonable time to apply to the Circuit Court.²

By act of March 3, 1820, the district judge may enjoin proceedings by warrant and distress against a debtor to the government or his sureties.³

In Massachusetts, the Supreme Court, or a justice thereof, may, either in term time or vacation, after the filing of the bill or other commencement of a suit concerning waste, issue a writ of injunction to stay waste, and issue such other writs and processes, and make such orders and decrees, according to the course of proceedings in equity, as justice and equity may require. The injunction may be dissolved, in term time or vacation, by the court or by a judge thereof.

When a person whose real estate is attached commits waste thereon, or threatens or prepares so to do, or when a real action is brought to foreclose or for possession under a mortgage, or for recovery of land, and waste has been committed or threatened by the defendant or any one claiming under him

¹ See Brightly's U. S. Dig. 256, § 3.

² *Ib.* 256, § 5.
³ *Ib.* 19, § 15.

or acting by his permission ; an injunction may issue (as above). But the petitioner may be required to give bond for all damages. And the court may arrest and commit the defendant for a violation of such injunction, and issue such other process as may be necessary or proper to enforce obedience, in like manner as the Supreme Court may do upon a suit in equity. The injunction may be dissolved (as above).¹

When leave is granted to file an information in the nature of a *quo warranto*, or at any time before final judgment, the court may by writ of injunction restrain the defendant corporation, its managers, servants, and agents, from exercising the franchise in question till further order of court.²

In New Hampshire, the Superior Court may grant writs of injunction, whenever necessary to prevent injustice ; and any justice of said court may issue writs of injunction to stay proceedings or waste until the end of the next term of the court in any county, unless sooner dissolved.³

Where the bank commissioners deem it unsafe for a bank to continue the issuing or circulation of its bills or notes, or where a bank refuses an examination by them ; they may obtain an injunction from a justice of the Superior Court.⁴

Such commissioners may also restrain by injunction any creditor of a bank from proceeding at law against such bank, where its affairs are in process of liquidation.⁵

Upon non-compliance on the part of a railroad corporation with any order relative to the construction of bridges, passes, or gates ; a judge of the Superior Court may by injunction prohibit the use of the road till compliance with the order.⁶

The same provisions, substantially, are made for injunction against insurance companies, as in the case of banks.⁷

When the levy of an execution is stayed by injunction, the lien and interest of the attaching creditor shall continue for thirty days after dissolution of the injunction. The levy shall be suspended during the injunction, and may be resumed within thirty days after dissolution, though the return day

¹ Mass. Gen. Sts. 710.

² Ib. 744.

³ N. H. Comp. Sts. 434.

⁴ Ib. 324.

⁵ Ib. 326.

⁶ Ib. 349.

⁷ Ib. 373.

have passed. If notice of sale has been given at the time of the injunction; upon dissolution, notice may be given as in the case of the sale of personal property.¹

In Maine, writs of injunction may be issued in cases of equity jurisdiction, and when specially authorized by statute. A justice of the Supreme Court may issue them in term time or vacation, to continue in force through the next term unless sooner dissolved, after notice to the adverse party, or upon bond with sureties for damages and costs.²

The bank commissioners may apply to a justice of the Supreme Court for injunction against a bank which has made over-issues, without paying the forfeiture of ten per cent. provided by law. And such bank shall be enjoined till payment of the forfeiture and costs; and, unless paid within the time fixed, perpetually enjoined. The commissioners may also obtain an injunction against a bank which is insolvent, or has exceeded its powers, or failed to comply with the requirements of law; and upon a hearing the injunction may be dissolved, modified, or made perpetual.³

Any court of record, before which an indictment, complaint, or action for a nuisance is pending, may in any county issue an injunction to stay or prevent such nuisance, and make such orders and decrees for enforcing or dissolving it as justice and equity require.⁴

In case of a railroad, when land damages remain unpaid for thirty days after demand, a judge of the court may, after notice, without bond, enjoin the use or occupation of the land till payment of damages and costs. If payment has not been made at the second term after the injunction, it may be made absolute, and all title to the land and what has been placed on it shall cease. In case of violation of the injunction, provision is made for the individual liability of the parties guilty of such violation.⁵

An injunction may be granted by a justice of the Supreme Court against waste by the defendant in an action to recover

¹ N. H. Comp. Sts. 504.

² Maine Rev. Sts. 469.

³ Ib. 342.

⁴ Ib. 214.

⁵ Ib. 364.

real estate, or whose real estate is attached. Either notice or a bond is required.¹

In Connecticut, a judge of the Supreme Court of Errors may on motion grant and enforce writs of injunction, according to the course of proceeding in courts of equity, in all cases within the jurisdiction of the Superior Court, arising in any county, when such court is not in session, which writs shall be returnable to the next Superior Court in that county. So also the judges of the county courts, in all causes within their jurisdiction, when the court is not in session. So the judge of the county court in any county, in all causes within the jurisdiction of the Superior Court when not in session, returnable to the next Superior Court.

The facts must be verified by the oath of the petitioner or a witness. The injunction may be issued with or without previous notice. The judge who issues the injunction may hear and decide upon a motion to dissolve it. In case of injunction by the judge of a county court, upon petition returnable to the Superior Court, a petition to dissolve may be presented either to him or a judge of the Supreme Court of Errors. Provision is also made for the sickness or other disability of a judge of the Supreme Court.

Upon injunction of the sale of personal property on execution, the judge or court may order an adjournment of the sale. If there be no such order, the officer may adjourn it, and the lien shall still continue.²

An injunction is authorized in case of the attachment of partnership property by the creditor of a partner.³

Also, after notice, on application of the county attorney or the bank commissioners, against any bank whose charter in their opinion is forfeited, or by which the public are in danger of being defrauded.⁴

Also on the application of a creditor to an amount exceeding one hundred dollars.⁵

A judge of the Superior Court, on application of the commissioners, may issue an injunction against any railroad cor-

¹ Maine Rev. Sts. 584.

² Conn. Sts. 1854, 473.

³ *Ib.* 479.

⁴ *Ib.* 241.

⁵ *Ib.* 250.

poration, where its rails, bridges, switches, engines or cars are in such condition, or its affairs so conducted, as to endanger the safety of the public, or where such corporation has in any material respect violated the law, or refused to obey the lawful directions of the commissioners, or unlawfully suffered any person to hold or exercise the duties of any office in the corporation.¹

In Vermont, no injunction issues till a bill is filed. The issuing of a subpoena attached to a bill is deemed the filing.

No injunction shall issue to stay the trial of a personal action at issue in a court of law, until the applicant gives bond with surety, conditioned for the payment of all intervening damages caused by delay, with additional costs in the action, if the plaintiff finally recovers. So also an injunction after verdict or judgment. But, in case of actual fraud, a bond may be dispensed with. So an injunction, after verdict, against an action of ejectment. In this case, the damages, upon dissolution, shall be settled by a master, and include the reasonable rents and profits and all waste committed after the injunction. The sufficiency of the surety shall be ascertained by the chancellor or by a master. The bond shall be filed before the injunction issues. Upon dissolution of an injunction staying execution of a judgment, the court may require the respondent to give security to the complainant for all such damages and costs as shall be finally awarded him by the court. Upon breach of a bond, the court shall order its delivery to the party entitled to the benefit of it, for prosecution, if circumstances so require.²

When the commencement of a suit is stayed by injunction, the time during which such injunction shall be in force shall not be included in the statute of limitations.³

The bank commissioner may obtain an injunction, after notice, against any banking corporation which is insolvent or has proceeded in violation of law ; and a receiver shall thereupon be appointed.⁴

Similar provision is made in regard to savings banks.⁵

¹ Conn. Sts. 1854, 761.

² Verm. Gen. Sts. 253.

³ Ib. 444.

⁴ Ib. 575.

⁵ Ib. 548-9.

In Rhode Island, the Supreme Court, or in vacation a justice thereof, may, upon notice and for cause, enjoin any railroad or turnpike corporation from using any Rhode Island franchises, in violation of law or of its charter.¹

The Supreme Court, or, in vacation, a justice thereof, on complaint of the bank commissioners, that in their opinion any bank or institution for savings has forfeited its charter, or is so conducting that the public or those having funds in its custody are in danger of being defrauded, or has become insolvent, shall issue notice to show cause why an injunction should not be granted; and after a hearing may enjoin the corporation from further proceeding with its business, and appoint a receiver. During such injunction all proceedings for the collection of debts against the corporation shall be stayed. A limited and temporary injunction may be granted, without the appointment of a receiver. Heavy penalties are imposed, for refusal to deliver the property to the receivers.²

“In New York, the *writ* of injunction, as a provisional remedy, is abolished by *the Code of Procedure*, and an injunction by *order* substituted. (a) The order may be made by the court in which the action is brought, or by a judge thereof, or by a county judge, and when made by a judge, may be enforced as the order of the court.”³

An injunction may be had to restrain the commission or continuance of some injurious act during the litigation; or when the defendant, during the litigation, threatens or prepares to do some act in reference to the subject of suit, which

¹ Rhode Island Rev. Sts. 389.

² Will. Eq. 342.

³ *Ib.* 290.

(a) For elaborate comments upon the New York system, by which jurisdiction at law and jurisdiction in equity are combined or blended, see *Knowles v. Gee*, 4 How. Pr. 317; *Millikin v. Cary*, 5 *Ib.* 272; *Williams v. Hayes*, *Ib.* 470; *Wooden v. Waffle*, 6 *Ib.* 145. It is said, “A bitter controversy, at one time, existed in New York, between the Supreme Court and the Court of Chancery, with respect to the power of the former to commit for contempt. And there has always been, while the two courts were kept separate, a strong party adverse to the existence of the Court of Chancery as a distinct tribunal. Nevertheless, the Supreme Court held that an existing injunction, although operating only on the parties, their attorneys and agents, would be noticed by the court for the purpose of promoting the ends of justice, and of preserving harmony between the two courts.” Will. Eq. Juris. 346.

will render a judgment ineffectual. Also to prevent a threatened disposition of property, pending an action, in fraud of creditors.¹

No personal action at issue in a court of law shall be enjoined, without a bond with surety, conditioned for the payment of all moneys which may be recovered, or the collection of which may be thereby stayed; and of the costs in equity. In case of application for an injunction after verdict and before judgment, either the amount of the verdict and costs must be deposited, or a bond given, as afterwards prescribed; and a subsequent section of the statute provides, that, after judgment, such bond shall be given, conditioned for the payment of such damages and costs as may be awarded at the first hearing, or the amount of the judgment deposited. The money may be paid over to the plaintiff at law, on his giving security to refund it, when ordered by the court. In actions for the recovery of lands or the possession thereof, after verdict, a bond must be given for the damages and costs that may be recovered therein. Where actual fraud in the verdict or judgment is alleged, the security above stated may be dispensed with. By the Code, when there is no statutory provision for security, the court or judge shall require a written engagement to pay all damages, not exceeding a certain sum, which may be caused by the injunction.²

Upon a civil action being commenced by the attorney-general in the Supreme Court, it may enjoin any corporation from assuming or exercising any franchise, &c., or transacting any business, not allowed by the charter. Also any individuals from exercising any corporate rights, &c., not granted them by a law of the State. Such injunction may be issued before answer, if the defendants have usurped, &c., any franchise, &c., not granted to them; and after answer it may be continued till judgment at law.³

The Supreme Court may restrain all alienations of property threatened or reasonably apprehended by the officers of a corporation, contrary to law, or for unauthorized purposes, known to the party receiving it.⁴

¹ Code, § 219.

² 3 N. Y. Rev. Sts. 5th ed. 762. See

³ 2 N. Y. Rev. Sts. 188, § 139; 190, § 147; Sts. 1847, 323, § 16; Code, § 222 · Will. Eq. 348-50.

Ib. 531.

⁴ Ib. 762-3.

When a corporation with banking powers, or to loan on pledges or deposits, or to make insurances, becomes insolvent or violates the law ; the Supreme Court, upon application of the attorney-general, may issue an injunction against it.¹

Where the collection of taxes is stayed by injunction, provision is made as to the duty of the collector.²

When an execution is returned unsatisfied, the creditor may by bill in chancery prevent the transfer of any property, money, or thing in action, or the payment or delivery thereof to the defendant, with the exception of trusts not executed by the defendant himself.³

Further provision is made to forbid the transfer of, or interference with, property of a judgment debtor, not exempt from execution.⁴

When commencement of an action is stayed by injunction, the time shall not be included in the statute of limitations.⁵

A similar provision is made in regard to the lien of judgments stayed by injunction, if a notice thereof is filed with the clerk within ten years of the docketing.⁶

A few decided cases are subjoined, turning, to some extent, upon the statutory law, and not cited in the body of this work.

The judgment of a justice without jurisdiction, on its face regular, may be perpetually enjoined by the Supreme Court.⁷

The plaintiff must show a case in which he will be entitled to final relief, and must pray for final judgment.⁸

(With regard to the change effected by the Code in the nature of the remedy of injunction, see *Linden v. Fritz*.⁹)

It is still held to be *discretionary*.¹⁰

The Code is held not to create new rights of action or remedies.¹¹

(As to the circumstances justifying an injunction, see *Androvette v. Bowne*.¹²)

¹ 3 N. Y. Rev. Sts. 5th ed. 764.

² 1 Ib. 921.

³ 3 Ib. 264.

⁴ Ib. 550.

⁵ 3 Ib. 507.

⁶ Ib. 637.

⁷ *Codper v. Ball*, 14 How. 275.

⁸ *Corning v. Troy, &c.*, 6 How. 89 ;

Hulce v. Thompson, 8, 475 ; *Hovey v. M'Crea*, 4, 31.

⁹ 3 Code R. 165 ; 5 How. 188.

¹⁰ *Crocker v. Baker*, 3 Abb. 183 ; *Minor v. Terry*, 6, 210 ; *M'Cafferty v. Glazier*, 10, 475.

¹¹ *Wordsworth v. Lyon*, 1 Code R. N. S. 163.

¹² 4 Abb. 440 ; also 15 How. 75 ; *Gal-*

A distinction is made between an injunction granted in an action as a provisional remedy, and the prohibition of the transfer of the property of a judgment debtor.¹

Injunction may be moved for at a general term.²

An injunction order may be vacated or modified without notice; but it is held to be very objectionable, without urgent cause.³

(In reference to the dissolving or modifying of injunctions, see *Newbury v. Newbury*.⁴)

No State officer or board, or person employed by them, shall be enjoined in the performance of any official duty, except by the Supreme Court sitting in the district where such board is located or such duty required, at a general term; after prescribed notice.⁵

An alderman cannot be enjoined from unlawfully voting by a tax-payer.⁶ Nor can the doings of commissioners of highways be enjoined.⁷ Nor the exercise of an office, pending a *quo warranto* to test the title of such office.⁸

(As to injunctions against proceedings in the same or other courts, see *Arndt v. Williams*.⁹)

A party enjoined from the prosecution of a suit is bound to communicate the prohibition to all parties employed by him.¹⁰

(As to the injunction of proceedings relating to land, see *Wordsworth v. Tyon*.¹¹)

As to the injunction of acts pending litigation, see *Olsen v. Smith*.¹²)

In an action by a wife for a divorce *a mensâ*, the defendant

latin v. Oriental, &c., 16 How. 253;
Lewis v. Oliver, 4 Abb. 121.

¹ *Green v. Bullard*, 8 How. 316.

² *Drake v. Hudson, &c.*, 2 Code R. 67.

³ *Bruce v. Delaware, &c.*, 8 How. 440.

⁴ 1 Code R. N. S. 409; also *Minor v. Terry*, 6 How. 210; *Malcomb v. Miller*, 6 How. 456; *Smith v. Austin*, 1 Code R. 135; *Bruce v. Delaware, &c.*, 8 How. 440.

⁵ *Sta. 1851, c. 488, § 1*. See *Fitzpatrick v. Flagg*, 4 Abb. 213; *Mace v. Trustees, &c.*, 15 How. 161; *Fuller v. Allen*, 7 Abb. 12; also Chap. XXII.

⁶ *Lewis v. Oliver*, 4 Abb. 121.

⁷ *Thatcher v. Dusenbury*, 9 How. 32.

⁸ *The People v. Draper*, 4 Abb. 333; 14 How. 233.

⁹ 16 How. 244; *Hunt v. Farmers', &c.*, 8 How. 416; *Chappel v. Potter*, 11, 365; *Bennett v. LeRoy*, 14 How. 178; *Field v. Holbrook*, 3 Abb. 377.

¹⁰ *Mayor, &c. v. Conover*, 5 Abb. 244.

¹¹ 1 Code R. N. S. 63; also 4 How. 463; *Cure v. Crawford*, 1 Code R. N. S. 18; *Hyatt v. Burr*, 8 How. 168; *Capet v. Parker*, 1 Code R. N. S. 90; *Bokee v. Hamersley*, 16 How. 461.

¹² 7 How. 481; also *Sebring v. Lant*, 9, 347; *Reubens v. Joel*, 3 Kern. 488.

may be enjoined from disposing of his property and leaving the State without provision for her.¹

(As to injunction in cases of fraud and insolvency, see *Malcomb v. Miller*.²)

A stockholder may enjoin the declaration of a dividend by the corporation, but not the payment of it, after it has been declared.³

As stated in the text of this work, injunctions have been granted to restrain the imposition of an illegal tax.⁴ The violation of an agreement for exclusive service.⁵ Or against carrying on a trade; though not where a penalty is provided.⁶ To give possession.⁷ To restrain the fraudulent transfer of stock by the company.⁸

(As to injunction in case of mortgage, see *Tarrant v. Quackenboss*.⁹)

In reference to trade-marks, see *Christy v. Murphy*.¹⁰

In reference to the security by bond or otherwise, see *Hutchinson v. Central, &c.*¹¹

As to the determination of the damages, see *Shearman v. N. Y., &c.*¹²

As to the effect of dismissal and an appeal, see *Guilford v. Cornell*.¹³

In reference to the admissibility and effect of affidavits, see *Millikin v. Carey*.¹⁴)

In New Jersey, the Court of Chancery shall be considered as always open for the granting of injunctions.¹⁵

¹ *Vermilyea v. Vermilyea*, 14 How. 470.

² 6 How. 467; also *Pomeroy v. Hindmarsh*, 5, 437; *Brewster v. Hodges*, 1 Duer, 609.

³ *Carpenter v. New Haven, &c.*, 5 Abb. 277.

⁴ *Wood v. Draper*, 4 Abb. 322; 14 How. 233.

⁵ *Fredericks v. Meyer*, 13 How. 566.

⁶ *Vincent v. King*, 13 How. 234.

⁷ *Erpstein v. Berg*, 13 How. 92.

⁸ *The People v. The Parker, &c.*, 10 How. 140.

⁹ 10 How. 244; also *Van Wagemen v. La Farge*, 13 Ib. 16.

¹⁰ 12 How. 77; also *Samuel v. Berger*, 4 Abb. 88; *Fetridge v. Wells*, 4 Abb. 144.

¹¹ 2 Abb. 394; also *O'Donnell v. Murn*, 3 Abb. 391; *Higgins v. Allen*, 6 How. 30; *Willett v. Stringer*, 15, 310.

¹² 11 How. 269; also *Hope v. Acker*, 7 Abb. 308; *Wilde v. Joel*, 15 How. 320; *Griffin v. State*, 5 How. 205; *Quilford v. Cornell*, 4 Abb. 220.

¹³ 4 Abb. 220; also *Hope v. Acker*, 7 Ib. 508; *Hoyt v. Carter*, 7 How. 140.

¹⁴ 3 Code R. 250; also *Levy v. Levy*, 6 Abb. 89; *Badger v. Wagstaff*, 11 How. 562; *Roome v. Webb*, 1 Code R. 114; *Florence v. Bates*, 2 Ib. 110; *Blatchford v. New Haven, &c.*, 7 Abb. 322; *Schoonmaker v. Reformed, &c.*, 5 How. 267; *Jaques v. Areson*, 4 Abb. 282; *Powell v. Clark*, 5 Abb. 70.

¹⁵ Nix. Dig. 67.

No injunction shall issue to stay proceedings at law in any personal action after verdict or judgment, on application of the defendant, unless the amount, with costs, is deposited with the clerk, or unless a bond satisfactory to the chancellor is given, with condition to abide any order or decree of the chancellor. A similar provision is made, in reference to security, in case of any mixed action after verdict or judgment.

Provision is made for subsequently inquiring into the sufficiency of the bond, ordering further security, or, in default thereof, dissolving the injunction.

No injunction shall be granted to stay proceedings before verdict or judgment, unless the chancellor is satisfied of the complainant's equity, by affidavit or otherwise.

In case of injunction against waste, if the injunction is violated, an attachment of contempt may issue, and the party may be committed.¹

An injunction staying proceedings in ejectment was granted for the loss of title deeds, but dissolved upon answer fully denying all knowledge of them.²

An injunction will not be dissolved as of course for a mere formal or technical denial of the charges in the bill.³ (See Chap. III.)

The objection of a *stale* claim applies only to the demand of the *complainant*. An injunction will not be continued, upon the ground that a claim which the defendant is seeking to enforce at law is stale.⁴

(As to an injunction and the dissolving thereof in case of a mine, see *Boston, &c. v. New Jersey, &c.*, 2 Beasl. 215; *New Jersey, &c. v. New Jersey, &c.*, 2 Beasl. 322.)

An individual can enjoin a public nuisance, preventively, only where he apprehends an injury distinct from that to the public.⁵

Equity will not enjoin the building of a bridge within certain limits, upon the claim of a bridge company to an exclusive

¹ Nix. Dig. 97, 98.

² *Horner v. Jobs*, 2 Beasl. 19.

³ *Ib.*

⁴ *Ib.*

⁵ *Allen v. Board, &c.*, 2 Beasl. 673 ;
acc. *Jersey, &c. v. Hudson, &c.*, *Ib.*
420.

right within those limits ; the answer showing that the bridge of the complainants has been so far appropriated to the uses of a railroad, as to render it inconvenient and dangerous for ordinary travel.¹

Where a bridge was technically a nuisance, but built in good faith and for the public benefit, under claim of lawful authority ; it was held that the court would not restrain it by injunction upon an information of the attorney-general.²

In 1790, the complainants were incorporated with authority to build a bridge over the Hackensack River, to take tolls from man and beast. It was also provided that it should not be lawful for any person to erect any other bridge over the river for a hundred years. In 1860, the legislature gave to the defendants power to build a railway from Hoboken to Newark, with the necessary viaduct over this river. The defendants built such viaduct, thus described in their answer : " A structure, so as to lay iron rails thereon, upon which engines and cars may be moved and propelled by steam, not to be connected with the shore on either side of said river, except by a piece of timber under each rail, and in such a manner, as near as may be, so as to make it impossible for man or beast to cross said river upon said structure, except in the cars of the defendants ; that the only roadway between said shores and said structure will be two or more iron rails, two and a quarter inches wide, four and a half inches high, laid and fastened upon said timber four feet ten inches asunder." It was held (in a learned and ingeniously critical and illustrative opinion), that the proposed structure was no *bridge*, within the meaning of the plaintiffs' charter ; having no footway for man or beast, and it being provided that the plaintiffs might collect tolls from men walking over their bridge, and for animals walking over it, drawing their burthens, while the defendants could not collect tolls for such use ; the franchises therefore being different : and the bill was accordingly dismissed.³

(As to service and violation of an injunction, see *Haring v. Kauffman*, 2 Beasl. 397.)

¹ *Trenton, &c. v. City, &c.*, 2 Beasl. 46.

² *Proprs., &c. v. Hoboken, &c.*, 2 Beasl. 503.

³ *Allen v. Board, &c.*, 2 Beasl. 67.

In Pennsylvania, the Supreme Court have chancery power and jurisdiction, for the prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community or the rights of individuals.

No injunction shall be issued, except where the commonwealth or a city or county is complainant, until the applicant gives bond with sureties for all damages thereby caused. In the case excepted, the court shall expedite the cause by such orders as they deem expedient.

No courts within the city and county of Philadelphia shall grant or continue injunctions against the erection or use of public works erected or in progress of erection, under authority of the legislature, until the questions of title and damages shall be submitted and finally decided by a common law court.

Special provision is made for security, in case of appeal from any order for the assignment or delivery of securities, documents, chattels, or things in action.¹

Any bank, against which the auditor-general has proceeded for alleged insolvency, if it denies the allegation, may apply for an injunction; which, after notice, and the finding of a jury that the bank has at all times redeemed its notes in specie, shall be granted.

If that officer fails to proceed according to law against any bank, a creditor of the bank may obtain an order upon him thus to proceed.

If any bank neglect or refuse to comply with a legal order of the auditor-general to do any act deemed necessary for the security of its creditors; the court, upon his petition, may enjoin such bank from pursuing its banking business, and place its property in the hands of a receiver.²

Provision is made for an injunction in certain cases against the erection of buildings in the city of Philadelphia.³

In case of ouster and exclusion by *quo warranto*, execution shall be had by a writ of injunction; reciting the judgment

¹ Purd. Dig. 404. (As to the rules of practice in this State, see Rules of Practice, adopted by the Supreme Court of Pennsylvania, May 27th, 1865. See also Brightl. Eq. 240; Fowle v. Spear, 7 Penn. L. J. 176; Stephen Girard, 4 Am. L. J. 101; Cooper v. Mattheys, 5 Penn. L. J. 40.)
² Purd. Dig. 83.
³ Ib. 781.

and enjoining the exercise of the office, &c., referred to; to be enforced by attachment and sequestration.¹

In Delaware, upon petition of one holding a lien upon real estate, the chancellor may award an injunction against waste.²

In Maryland, where an injunction has issued against waste, if the party commits or authorizes waste, the court may issue an attachment for contempt, and punish by fine or imprisonment, or both. On complaint, the court, either before or after attachment and imprisonment, may ascertain the value of the waste, and require payment of double the amount, and enforce it by attachment for contempt or *fiery facias*.

Upon application by an executor or administrator to stay proceedings at law, the court may prescribe the penalty of a bond, with security, to perform the order or decree; and may decree against him according to equity and good conscience.

Where an officer is prevented by injunction from selling personal property taken in execution; he shall restore it, and not be answerable to the execution plaintiff.³

Each of the circuit judges may grant injunctions in his circuit.⁴

Clerks may approve injunction bonds.⁵

No injunction shall be granted to stay any sale, or proceedings after any sale, of mortgaged premises (under a power of sale), unless the applicant therefor is party to the mortgage, or claims of right under a party accruing since the recording of the mortgage, nor without an allegation on oath of full or partial payment, for which the mortgagee refuses to give credit, or fraud, particularly set forth, in obtaining the mortgage. If such injunction is granted, the court or judge may, after ten days' notice, hear and decide on a motion to dissolve it; and, if obtained by misrepresentation and for delay, shall award ten per cent. interest on the mortgage debt from the granting

¹ Purd. Dig. 833.

² Laws of Delaware, 294.

³ 1 Md. Laws, 81.

⁴ Ib. 82.

⁵ Ib. 109.

to the dissolving of the injunction ; to be enforced like other decrees. The complainant or some person in his behalf shall give bond, with at least two good securities, to perform the decree ; upon which bond the mortgagee or his assigns may recover all the debt, damages, interest, and costs decreed on dissolving the injunction.¹

In Ohio, the injunction provided by the Code is a command to refrain from a particular act. It may be the final judgment in an action, or may be allowed as a provisional remedy ; and shall be by order. The writ of injunction is abolished. Injunction may be had, when the petition shows a title to relief, consisting in the restraint of the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce great or irreparable injury, or when, during the litigation, the defendant is doing or threatens, or is about to do, or is procuring or suffering, some act in violation of the plaintiff's rights, and tending to render the judgment ineffectual.

Very liberal provision is made as to the courts which may grant the injunction. Notice is authorized to be given. A party who has answered shall not be enjoined without notice ; but may be restrained until the application for an injunction is decided. A bond shall be given, with sufficient surety, for all damages. Provision is made in regard to the service. The injunction is binding from the time the party has notice, and the required undertaking is executed. No injunction shall be granted by a judge, after a motion therefor has been overruled on the merits by his court, and, if refused by the court in which the action is brought or a judge thereof, it shall not be granted to the same applicant by an inferior court or a judge thereof.

Injunction from a judge may be enforced as the act of the court. Disobedience may be punished as a contempt by the court or a judge who might have issued it in vacation. An attachment may be issued, and the party required to pay a fine not exceeding two hundred dollars, make immediate restitution, and give further security, or else committed.

¹ Md. Laws, 447.

Where a surety has left the State or is insufficient, the court may vacate the injunction, unless a new security is given.

Affidavits may be used. If the injunction is granted without notice, the defendant, at any time before trial, may apply to have it vacated or modified. The application may be made upon the petition and accompanying affidavits, or upon affidavits for the defendant, with or without answer. If made upon affidavits for the defendant, the plaintiff may offer affidavits and new evidence.

A defendant may have an injunction upon an answer in the nature of a counter-claim. He shall proceed as above.¹

No security is required from the attorney-general, when he proceeds by injunction on behalf of the State.²

In Michigan, provision is made for the security to be given in case of injunctions restraining proceedings to enforce judgments. So also, with special reference to suits brought for the recovery of lands. Also for determining the damages upon dissolution of the injunction. In case of alleged actual fraud, the above provisions may be dispensed with.³

Provision is made for restraining proceedings against corporations or its officers in certain cases.⁴

An appeal lies from an order adjudging a party guilty of contempt in violating an injunction, and awarding a sum of money as indemnity.⁵

An injunction bill, strictly, is one asking no other relief. If other relief is asked, the injunction is auxiliary, and falls with the bill.⁶

Though a party in possession be enjoined from committing trespasses, interfering with the possession, or entering; he cannot be punished as for contempt, for maintaining his possession by force. Even a wrong-doer cannot be turned out of possession by an *ex parte* preliminary order or process.⁷

¹ Curwen's Laws of Ohio, 1200.

² *Ib.* 1108.

³ 2 Michigan Comp. L. 1021.

⁴ *Ib.* 1299.

⁵ *People v. Messler*, 9 Mich. 492.

⁶ *Blackwood v. Van Vleet*, 11 Mich. 252.

⁷ *People v. Simonson*, 10 Mich. 335.

In Wisconsin, the Supreme Court may grant writs of injunction.¹

So also the Circuit Courts.²

The writ of injunction is abolished. The injunction provided for by law is a command to refrain from a particular act. It may be the final judgment in an action, or may be allowed as a provisional remedy. The order may be made by the court in which the action is brought, or a judge thereof, or a county judge, or court commissioner; and when made may be enforced as the order of the court.

When the complainant appears by his complaint entitled to relief by restraining the commission or continuance of some act, which during the litigation would be injurious to him, or when, during the litigation, the defendant is doing, or threatens, or is about to do, or procuring or suffering some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual; such act may be temporarily enjoined. So when, pending an action, it appears by affidavit that the defendant threatens or is about to remove or dispose of his property in fraud of creditors.

The injunction may be granted at the commencement of the action, or any time after, before judgment. A copy of the affidavit must be served with the injunction.

An injunction is not allowed after answer, unless upon notice or an order to show cause. But in such case the defendant may be restrained, until the decision of the court or judge, granting or refusing the injunction.

In the absence of express provision by statute, the plaintiff shall give a written undertaking, with or without securities, to pay damages, not exceeding a certain sum, if the injunction be refused; the amount to be ascertained by reference or otherwise, as the court shall direct.

The defendant may be allowed a hearing, if thought proper, and restrained in the mean time.

An injunction to suspend the general and ordinary business of a corporation shall not be granted except by the court or a judge thereof; nor without notice, unless the people are a

¹ Wisc. Rev. Sts. 639.

² Ib. 644.

party, until the plaintiff give security to pay all damages (settled, as above).¹

A railroad company, which neglects, for six months after taking or appropriating land, to pay therefor, may be enjoined from the use thereof till payment.²

The time, during which an action is restrained by injunction, is excepted from the statute of limitations.³

Appeals in case of injunction are regulated.⁴

No injunction shall be dissolved at chambers but by a circuit judge.⁵

Provision is made for injunction against waste.⁶ Also in case of a meandered river.⁷

The Circuit Court, upon complaint under direction of the attorney-general, may enjoin a corporation from assuming or exercising any franchise, &c., or transacting any business, not authorized by the charter. It may also enjoin an individual from unlawfully exercising any corporate rights, &c.⁸

In Missouri, injunctions may be granted by the Circuit Court or a judge in vacation, or, in cases specified, by the county court or any two justices in vacation.

A temporary injunction lies, when the petition shows ground for restraining the commission or continuance of some act, which during the litigation would be injurious, or when during the litigation the defendant is doing, or threatens, or is about to do some act in relation to the plaintiff's rights respecting the subject of action, and tending to render the judgment ineffectual.

Before injunction to stay proceedings, notice is required.

No injunction shall be granted to stay any judgment or proceeding, except so much of the recovery or cause of action as the plaintiff shall show himself equitably entitled to be relieved against, and so much as will cover costs.

The injunction operates as a release of errors.

No injunction, unless on final hearing or judgment, shall issue, without a bond with security for the amount or other

¹ Wisc. Rev. Sta. 735.

² Ib. 737.

³ Ib. 823.

⁴ Ib. 826.

⁵ Ib. 826.

⁶ Ib. 855.

⁷ Ib. 857.

⁸ Ib. 874.

matter to be enjoined and all damages ; to abide the decision thereon, and pay all damages and costs adjudged, in case of dissolution.

Upon dissolution, in whole or in part, damages shall be assessed by a jury, if demanded ; otherwise by the court ; not to exceed ten per cent., exclusive of legal interest and costs, where money or proceedings for collection of any money or demand have been enjoined. The court shall enter judgment upon the bond, and issue execution or proceed otherwise, according to rules and practice.

When a court is applied to for injunction upon its own proceedings, no notice is required, unless prescribed by rules of court.

Successive injunctions are provided against.

Violation of an injunction is punishable by commitment as a contempt.

After answer, a motion may be made to dissolve. Testimony may be introduced, and the court shall decide thereupon, without being bound by the answer.

Provision is made for postponement, for the purpose of disproving the bill or answer. Also in reference to affidavits, depositions, and notice.

A married woman may have an injunction against her husband, when from habitual intemperance or other cause he is about to squander and waste her separate property, or fraudulently convert it to his own use.

Special provision is made for proceedings in the county of St. Louis.¹

Upon dissolution of an injunction against a judgment, it is erroneous to enter judgment upon the bond.²

The State has no interest in the matter of restraining a county court from issuing its bonds or levying a tax to pay for a subscription to the stock of a railroad ; and cannot therefore be properly made plaintiff in a bill for injunction, at the relation of an individual.³

An officer upon an execution against A seized personal

¹ 2 Mis. Rev. Sts. 1247.

² Roach v. Burnes, 33 Mis. 319.

³ State v. Parkvitte, 32 Mis. 496.

property, which was replevied by B. In the replevin suit, the officer had judgment against B and his securities in the bond for the value of the property, and A afterwards assigned to B the surplus over the execution and costs. Held, B could not enjoin the officer from collecting the full amount of the judgment.¹

In Tennessee,² injunctions are granted by the chancellors and circuit judges, and judges of special courts. The party must state in his bill or petition that it is the first application. If an application is made and refused, no other shall be granted, except by the court in which the bill is filed.

The clerk and master shall take, besides the usual bond for prosecution of the suit, a bond conditioned, according to the object of the bill, as follows:—

In case of judgment, to pay the amount of it with interest, damages, and costs, or to perform the decree of the court if the injunction is dissolved, and also to pay all damages caused by the wrongful suing out of the attachment. If before judgment at law the investigation of the questions has been drawn by injunction into the Court of Chancery, as having concurrent jurisdiction, the condition shall be to pay costs and damages awarded by the chancery court on dismissing the bill.

If the object is to enjoin a money demand after judgment, the penalty shall be in double the judgment or sum sought to be enjoined. In all other cases, such sum as the court shall order. If no order, in the sum of five hundred dollars.

The damages may be ascertained by the court in which the cause is heard and injunction dissolved, upon reference to the clerk and master, and proof, or upon an issue of fact before a jury.

If the defendant evade or attempt to evade service of the injunction, leaving a copy at his residence shall be sufficient service.

A defendant may move to modify or dissolve an injunction in vacation, before the chancellor of the division in which the bill is filed, either for want of equity in the bill, or upon the coming in of the answer, to be heard upon certified copies.

¹ *Hobenthal v. Watson*, 34 Mis. 183. ² *Sts. of Tennessee—Injunction.*

A motion to dissolve may be made at any time, upon answer, or for want of equity on the face of the bill.

Pending exceptions to the answer, a motion to dissolve upon the answer does not lie, unless the motion would not be affected by such exceptions.

Upon dissolution of an injunction to stay proceedings upon a judgment for money, in whole or in part, the decree interlocutory or final shall be entered against the complainant and sureties for such amount as the court may order; and execution may issue thereon.

In case of the dissolving of an interlocutory injunction upon a judgment for money, the defendant shall give a refunding bond, in double the sum to be collected, conditioned to refund it, if so ordered on final hearing; upon which bond the court may render a decree.

(There are some other provisions, not requiring to be stated.)

In Kentucky, when an injunction is dissolved, the plaintiff shall be decreed to pay the costs occasioned thereby.¹

A judge of the Court of Appeals may reinstate injunctions.²

The presiding judge of the county court may grant injunctions.³

In Illinois, the Supreme and Circuit Courts, and any judge thereof in vacation, may grant writs of injunction. But not to stay proceedings under a judgment of a justice of the peace, for a sum not exceeding twenty dollars, besides costs.

An injunction from the Supreme Court or a judge thereof shall be returnable into the circuit of the proper county.

An injunction to stay a suit or judgment at law shall be in the same county, and the writ of subpoena may be sent into any county where the defendant resides.

Injunction of a judgment shall be only for such sum as the party is not equitably bound to pay, and costs. An injunction shall operate as a release of errors. A bond is given, with surety, for all money and costs due or to be due to the plain-

¹ 1 Ky. Rev. Sts. 291.

² Ib. 325.

³ Ib. 304.

tiff at law, and all costs and damages awarded in case of dissolution. If dissolved, wholly or in part, the complainant shall pay, exclusive of legal interest and costs, such damages as the court shall award, not exceeding ten per cent., and the clerk shall issue execution thereof, with execution on the judgment.

For disobedience and breach of an injunction, an attachment for contempt may issue, from the judge who granted it, or, if granted in open court, from any judge of that court, in vacation. Unless disproved or purged, the party may be committed till the sitting of the court in which the injunction is pending, or bail taken for his appearance.

Upon filing an answer, a dissolution may at any time be moved for. Testimony is admissible, and the answer need not be taken as true. For the purpose of meeting the answer, alleged to be untrue, by testimony to be subsequently procured, the case may be continued. The testimony shall be by depositions, except the affidavits filed with the bill or answer. The depositions may be read on the final hearing of the cause.¹

Proceedings upon an execution, issued on a judgment by confession or warrant of attorney on a demand not due, may be enjoined by the Circuit Court for the county. A bond is required, as in other cases.²

Bills for injunctions of proceedings at law shall be filed in the office of the Circuit Court of the county where the record of the proceedings is made.³

Injunctions by masters in chancery are authorized, in the absence of a judge.⁴

Provision is made for motions to dissolve in vacation.⁵

Upon application of bank commissioners, for violation of the provisions of the act relating to them, by any bank, corporation, broker, banker, dealer in money, produce or foreign merchandise, or their officer, clerk, agent, or employé: an injunction may be issued, to be enforced according to the proceedings in chancery. And a bank may thereupon be put into liquidation.⁶

¹ 1 Statutes of Illinois, 147.

² *Ib.* 164.

³ *Ib.* 138.

⁴ *Ib.* 145.

⁵ *Ib.* 149.

⁶ *Ib.* 128.

Where a town collector is enjoined from the collection of taxes for wrongful assessment, the board of supervisors may order a re-assessment.¹

Injunctions may issue in behalf of the State.²

Writs of injunction may be issued by judges of the Circuit Courts.³

A perpetual injunction will be granted against a sale on mortgage, where the mortgagor, wholly under the control of the mortgagee, is made imbecile by habitual intemperance, and nearly insane; no consideration being proved.⁴

A bill to enjoin a judgment will be dismissed, unless it not only show, why the evidence was not saved by exceptions, but what the evidence was which authorized the judgment, and the grounds of defence, the reason why it was not made, and other necessary facts.⁵

An injunction may be had against the collection of the obligations originally given for the support of a railroad, if the company discontinue the work, or attempt to misapply its funds, or radically to change the character of the enterprise.⁶

One in quiet possession as owner may have an injunction against dispossession by process in a litigation to which he was no party.⁷

An injunction bond includes costs, if awarded on dissolution.⁸

Damages may be recovered upon the bond, whether awarded on dissolution, or afterwards, or in a different proceeding.⁹

In Indiana, injunctions may be granted, to stay waste; to stay all proceedings on judgments at law; to stay and suspend proceedings on suits pending before the Circuit Court or court of inferior jurisdiction; to exercise all powers usual and necessary for courts of chancery, in granting and enforc-

¹ Statutes of Illinois, 361.

² *Ib.* 643; 2 *Ib.* 1168.

³ 1 *Ib.* 125.

⁴ *Van Horn v. Keenan*, 28 Ill. 445.

⁵ *Buntain v. Blackburn*, 27 Ill. 406.

⁶ *Illinois, &c. v. Cook*, 29 Ill. 237.

⁷ *Goodnough v. Sheppard*, 28 Ill. 81.

⁸ *Hibbard v. McKindley*, 28 Ill. 240.

⁹ *Ib.*

ing restraining orders and injunctions ; and to issue all requisite and usual (in chancery) process.

No injunction lies, except in case of emergency, till ten days' previous notice, unless applied for in open court, in relation to a suit pending therein.

A judgment in a personal action shall not be enjoined, without a bond with surety for its amount, interest, and costs, and the damages and costs of the injunction, if dissolved. And the complainant shall also indorse and sign on his bill a release of errors, when required.

Injunction shall be limited to the amount of the judgment not equitably due.

No injunction shall issue to stay proceedings at law after judgment in an action for lands, without a bond with surety for all damages and costs.

In other cases, a bond shall be given for damages and costs.

Ten per cent. damages upon dissolution of injunction to stay proceedings after judgment.

In case of injunction against a suit for land after verdict or judgment, the damages, upon dissolution, shall include the rents and profits, and all waste subsequent to the injunction.

Upon the granting or continuance of an injunction, the court may impose equitable terms and conditions on the party obtaining it.

When an injunction is allowed after judgment, all officers of the court, the party, his agent and attorney shall suspend proceedings, and any process issued shall be stayed.

A writ of injunction is not necessary.

Provision is made for repayment of money collected on execution by the sheriff.

Also for an attachment for contempt, upon violation of an injunction against waste.

Particular provision is also made as to motions for dissolution.

Jurisdiction is given to the Probate Courts.¹

As to the authority of one court over another, see *The Indiana, &c. v. Williams*.²

¹ Indiana Rev. Sts. 851. See p. 543.

² 22 Ind. 198.

The collection of illegal taxes may be enjoined.¹

An injunction will not be granted, upon the principle of marshalling securities, where a judgment is recovered against A and B, and the property of A has been conveyed under a junior lien to C, and the property of B to D, and the judgment creditor seeks and enforces payment in the first instance from the property of A.²

Land was conveyed to the defendants, trustees of a religious society, of which the plaintiffs were members, for its use, according to the discipline of the General Conference. The society having erected a church, with a basement for a prayer-room, the trustees leased the latter to a teacher of a common day school, with leave to adapt it to his business. Held, an injunction should be granted.³

An injunction or temporary restraining order is rightly dissolved, unless the complaint allege sufficient ground therefor.⁴

An injunction cannot be granted by a master commissioner.⁵

A judge of the Circuit Court granted an injunction in vacation without notice. At the next term, the defendants appeared and demurred, and, pending the demurrer, prayed an appeal from the original order. Held, allowable, and that the order, without notice, was erroneous.⁶

But a temporary restraining order of the court or a judge is not appealable to the Supreme Court.⁷

In Minnesota, the District Court or a judge thereof may grant writs of injunction in all civil actions, on complaint, and, when a counter-claim or equities in the nature of one are set up in an answer, then on such answer affidavits are allowed. Such writs may be granted in the progress of any action, either by petition duly verified, or on affidavits, or both. But no injunction shall issue to stay proceedings in any civil action, before final decision.⁸

Provision is made for injunction against corporations, and

¹ *The Toledo, &c. v. Lafayette*, 22 Ind. 262.

² *Sanders v. Cook*, 22 Ind. 436.

³ *Perry v. McEwen*, 22 Ind. 440.

⁴ *Sutherland v. The Lagro, &c.*, 19 Ind. 192.

⁵ *Glass v. The Board &c.*, 16 Ind. 113.

⁶ *Flagg v. Sloan*, 16 Ind. 432.

⁷ *Cincinnati, &c. v. Hunccheon*, 16

Ind. 436.

⁸ *Sts. of Min.* 480.

individuals claiming corporate powers.¹ Also against insolvent corporations.² For appeal.³ And in reference to the general course of proceeding, security, &c.⁴

In Oregon, no writ of injunction shall be issued, but upon bill or petition, filed, and verified by oath. It may be issued by the court or a judge in vacation. A bond shall be given, with surety, to abide the decision, and pay all damages and costs adjudged in case of dissolution. In case of proceedings at law, the bond shall be for payment of all moneys and costs due or to become due from the complainant, and all decreed against him upon dissolution.

In case of injunction to stay proceedings at law for recovery of money, upon dissolution, and dismissal of the bill, the court shall render a decree for the debt or damages, interest and costs accruing in chancery, with five per cent. on the debt and interest. When an officer has received money on an execution which is enjoined, the officer shall repay the money, retaining costs of collection; if it has not been paid over.⁵ (The same provision is made in Indiana.)

In Kansas, injunctions may be dissolved or modified in vacation.⁶

An injunction is a command to refrain from a particular act. It may be final or provisional—the latter by order. The writ of injunction is abolished. (The circumstances under which injunction is allowed are substantially the same as in other Western States, and similar to those in New York. Also the provisions as to security and notice.) The order of injunction is addressed to the party enjoined, states the injunction, and is issued by the clerk. When allowed at the commencement of the action, the clerk indorses upon the summons “injunction allowed,” and no order is necessary; nor in case of notice of the application. An injunction is binding from notice. Provision is made against successive injunctions. An injunction granted by a judge may be en-

¹ Sts. of Min. 606.

² Ib. 607.

³ Ib. 621.

⁴ Ib. 670-1.

⁵ Oregon Sts. 202.

⁶ Comp. Laws of Kansas, 454.

forced as the act of the court. Disobedience may be punished as a contempt. The party may be fined not exceeding two hundred dollars, required to make immediate restitution, and give security — or committed. Further security is provided for in case of removal or insufficiency. Affidavits are allowed. Provision is made for modifying or dissolving the injunction.¹

Provision is made for enjoining the transfer of or interference with property by a judgment debtor.²

In Iowa,³ an injunction may be granted as an independent means of relief or as auxiliary to other proceedings, in accordance with the rules heretofore observed, except as herein modified.

When applied for as an independent means of relief, the petition must be sworn to and presented to the District Court, if in session in the county, for an allowance of the injunction. If not in session, application for that purpose may be made to any judge of the Supreme Court or District Court, or to the judge of the county court of the proper county.

If the order of allowance is made by the court in session, the clerk shall make an entry thereof in the court record, and issue the writ accordingly. If made in vacation, the judge must indorse the said order upon the petition.

When it is a mere auxiliary measure resorted to during the trial of the principal cause, the terms on which it is allowed, as well as the kind of notice to be given to the opposite party, shall be such as the court prescribes.

In both the cases contemplated in the last section, the order of allowance must direct the writ to issue only after the filing of a bond in the office of the clerk of the District Court, in a penalty to be therein fixed, with sureties to be approved by said clerk (unless the court or judge granting the said order has previously approved said sureties), and conditioned for the payment of all the damages which may be adjudged against the petitioner by reason of such injunction.

When proceedings in a civil action are sought to be en-

¹ Comp. Laws of Kansas, 164.
² *Ib.* 208.

³ Iowa Code, Chapters 112, 114, 126, 141.

joined, the suit must be brought in the county wherein such proceedings are pending. The bond must also in that case be further conditioned, to pay any judgment that may be ultimately recovered against the party who seeks the injunction, for the cause of action on which the suit sought to be enjoined is founded.

The penalty of the bond must be fixed by the court or judge who makes the order, and must be doubly sufficient to cover any probable amount of liability to be thereby incurred.

Upon the filing of the bond as required, the clerk must issue the writ of injunction as directed by the order of allowance.

The court or judge before granting the writ may, if deemed advisable, allow the defendant an opportunity to show cause why such order should not be granted.

If the writ is granted without allowing the defendant to show cause, he may at any time before the next term of the court apply to the judge who made the order to vacate or modify the same.

Such application must be with notice to the plaintiff, and may rest upon the ground that the order was improperly granted, or it may be founded upon affidavits on the part of the defendant. In the latter case the plaintiff may fortify his application by counter-affidavits and have reasonable time therefor.

The judge may thereupon decide the matter at once, unless some good cause for delay be shown. But the vacation of the order shall not prevent the cause from proceeding, if anything be left to proceed upon.

Any judge of the Supreme or District Court, being furnished with an authenticated copy of the writ of injunction, and also with satisfactory proof that such injunction has been violated, shall issue his precept to the sheriff of the county where the violation of the injunction occurred, or to any other sheriff (naming him) more convenient to all parties concerned, directing him to attach said defendant and bring him forthwith before the same or some other judge, at a place to be stated in said precept.

If, when thus produced, he files his affidavit denying or sufficiently excusing the contempt charged, he shall be released, and the affidavit shall be filed with the clerk of the court for preservation.

But if he fail to do so, the judge may require him to give bond, with surety, for his appearance at the next term of the court, and also for his future obedience to the injunction, which bond shall be filed with the clerk.

If he fail to give such security, he may be committed to the jail of the county where the proceedings are pending, until the next term of the court.

If the security be given, the court at the next term shall act upon the case, and punish the contempt in the usual mode.

The defendant may move to dissolve the injunction, either before or after the filing of the answer.

Issue may be joined on the defendant's answer, and a trial had as in other cases.

When practicable, the whole matter connected with the injunction shall be disposed of on such trial, and complete justice administered to all parties.

Only one motion, to dissolve or modify an injunction upon the whole case, shall be allowed.

Upon the dissolution, in whole or in part, of an injunction to stay proceedings upon a judgment or final order, the damages shall be assessed by the court, which may hear the evidence and decide in a summary way, or may, on the request of either party, cause a jury to be impanelled to find the damages. Where money is enjoined, the damages may be any rate per cent. on the amount released by the dissolution, which in the discretion of the court may be proper, not exceeding ten per cent. And where the delivery of property has been delayed by the injunction, the value of the use, hire, or rent thereof shall be assessed. Judgment shall be rendered against the party who obtained the injunction, for the damages assessed, and against the surety of such party.

For good cause shown, a judge's order may issue in vacation, directing any of the officers of the court in relation to the discharge of their duties.

Such order shall be in force only during the vacation in which it is granted, and for the first two days of the ensuing term.

The judge granting it may require the filing of a bond, as in case of an injunction, unless, from the nature of the case, such requirement would be clearly unnecessary and improper.

In all cases of breach of contract or other injury, where the party injured is entitled to maintain, and has brought an action by ordinary proceedings, he may, in the same cause, pray and have a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or action, and he may also, in the same action, include a claim for damages or other redress.

In such action, judgment may be given for other relief, and also that the writ of injunction do or do not issue, as justice may require ; and, in case of disobedience, such writ of injunction may be enforced by attachment by the court, or, when such court shall not be sitting, by a judge thereof.

It shall be lawful for the plaintiff, at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* to the court or a judge for a writ of injunction, to restrain the defendant in such action from a repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right ; and such writ may be granted or denied by the court or judge, upon such terms, as to the duration of the writ, keeping an account, giving security, or otherwise, as to such court or judge shall seem reasonable and just, and, in case of disobedience, such writ may be enforced by attachment by the court, or, when such court shall not be sitting, by the judge thereof: *Provided always*, that any order for a writ of injunction, made by a judge, or any writ issued by virtue thereof, may be discharged or varied, or set aside by the court, on application thereto by any party dissatisfied with such order.

The party seeking to vacate or modify a judgment or order made in the District Court, or by a judge thereof, may obtain an injunction suspending proceedings on the whole or part thereof, which injunction may be granted by the court or the judge thereof, upon its being rendered probable, by affidavit or petition sworn to, or by exhibition of the record, that the party is entitled to have such judgment or order vacated or modified.¹

(As to injunctions by courts of law; and that the application need only conform substantially to the statute, see *Hall v. Crouse*.²)

A motion for injunction must specify the grounds.³

A perpetual injunction will not be reversed by the court above, unless it appears that the record embraces all the evidence.⁴

A tax sale will not be enjoined upon the ground of a vague and indefinite description of the property.⁵

A purchase under a false impression as to the article purchased, but without fraud or warranty, is no ground for injunction.⁶

Under the Code of 1851, damages might be awarded on the bond, upon dissolution. A subsequent award upon notice and motion would be irregular, but not reversed unless in case of appearance and objection.⁷

A petition for injunction in a proceeding to cancel a mortgage sale must allege a tender of the amount admitted to be due.⁸

After a mandamus to a county judge, requiring him and the other members of the board of canvassers to canvass the returns of an election on a proposition to remove the county seat from one town to another; an injunction may still be granted against such removal. The object of the latter process is to determine the validity of the returns; of the former, to compel ministerial officers to perform their duty by a canvass.⁹

¹ See *Way v. Lamb*, 15 Iowa, 79; *Taylor v. Dickinson*, Ib. 484; *Davis v. Bonar*, Ib. 171.

² 14 Iowa, 487.

³ *Hall v. Crouse*, 14 Iowa, 487.

⁴ *Hayden v. Wittze*, 13 Ib. 604.

⁵ *The Burlington, &c. v. Spearman*, 12 Ib. 113.

⁶ *Street v. Rider*, 14 Iowa, 506.

⁷ *Woods v. Irish*, Ib. 427.

⁸ *Sloan v. Coolbaugh*, 10 Ib. 31.

⁹ *Dishon v. Smith*, Ib. 221.

In California, an injunction is a writ or order, requiring a person to refrain from a particular act.

It may be granted —

1. When the complaint shows that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited time or perpetually.

2. When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce great or irreparable injury to the plaintiff.

3. When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

The injunction may be granted at the time of issuing the summons upon the complaint; and at any time afterwards, before judgment, upon affidavits. The complaints or affidavits must show sufficient grounds. The complaint must be sworn to by the plaintiff or some one in his behalf. The oath must declare, that the party has read or heard the complaint, and knows the contents, and that it is true of his own knowledge, except matters stated on information, &c., as to which he believes it to be true. When granted on the complaint, a copy of the complaint and verification shall be served with the injunction; if upon affidavit, a copy thereof.

An injunction is not allowed after answer but upon notice or order to show cause. But the defendant may be restrained until the decision upon the application for injunction.

A written undertaking shall be given, except by the people, to pay all damages.

Notice may be required, and the defendant restrained in the mean time.

An injunction to suspend the general and ordinary business of a corporation shall not be granted except by the court; nor without notice to the officers, unless the people are a party.

A party may apply upon reasonable notice to the court or the judge who granted an injunction, without notice, for a

dissolution ; either upon the complaint and affidavit, or affidavit on the part of the defendant, with or without answer. If upon affidavits for the defendant, not otherwise, the plaintiff may offer affidavits, or new evidence.

The injunction may be dissolved or modified.¹

Dissolution of an injunction was ordered upon answer, denying equities.²

(As to the effect of *laches*, see *Real, &c. v. Pond, &c.*³

As to the dissolution of an injunction by the judge who granted it, see *Creanor v. Nelson*.⁴

As to the rules of practice, affidavits, and appeal, see *Gagliardo v. Crippen*.⁵)

Upon denial of equities by affidavits, *pendente lite*, an injunction was refused.⁶

So in case of denial in the answer, the cause being heard on the pleadings.⁷

(As to notice, see *Johnson v. Wide, &c.*⁸)

An injunction was granted in case of a right of way.⁹

A perpetual injunction will be granted, where the statute under which proceedings are had for condemnation of land for road purposes is unconstitutional ; or for want of notice, or compensation.¹⁰

Such injunction does not prevent a future opening upon correct proceedings.¹¹

In case of disputed title, the question of injunction during litigation depends materially upon the pecuniary ability of the creditors.¹²

(As to the injunction of executions, see *Spencer v. Vigneaux*.¹³)

A grantee may enjoin a sale of real estate on an execution against the grantor ; such sale, though passing no title, being sufficient to throw a cloud over the title.¹⁴

¹ California Laws, 537.

² *Real, &c. v. Pond, &c.*, 23 Cal. 82.

³ 23 Cal. 82.

⁴ *Ib.* 464.

⁵ 22 Cal. 362.

⁶ *Gagliardo v. Crippen*, 22 Cal. 362.

⁷ *Ib.*

⁸ 22 Cal. 479.

⁹ *Kittle v. Pfeiffer*, 22 Cal. 484.

¹⁰ *Curran v. Shattuck*, 24 Cal. 431.

¹¹ *Ib.*

¹² *Real, &c. v. Pond, &c.*, 23 Cal. 82.

¹³ 20 Cal. 442 ; also *Comstock v. Clemens*, *Ib.* 77.

¹⁴ *England v. Lewis*, 25 Cal. 357.

An owner of land, in possession, cannot enjoin a sheriff from executing a writ of restitution issued on a judgment rendered against third parties, to which he is a stranger.¹

No injunction lies to protect property, during litigation, where the complainant shows that he has no interest or claim to relief.²

(As to injunction in case of mining, see *Logan v. Driscoll*.³)

A claimant of public lands, for fruit trees or crops, cannot enjoin mining thereon, unless the trees were planted or crops sown before location for mining.⁴

In an action for trespass upon a mining claim, the plaintiffs alleged that the defendants were working and extracting from the mine, which was admitted by the answer, but the title denied. The jury found a verdict for the plaintiffs, and an injunction was granted.⁵

An injunction was refused in the case of rival bridges.⁶

Where land has been condemned according to law for a highway, and damages assessed, and an official warrant for the amount tendered and refused; equity will not enjoin the road overseer from tearing down the fences and opening the highway.⁷

An injunction lies against using the name of a hotel. Thus the complainant kept a hotel under the name of "The What Cheer House," upon leased land. He afterwards purchased the adjacent lot, and erected a larger building, continuing to occupy both, but having the principal sign on the latter. He then surrendered the former estate, continuing the business upon the latter. The defendant purchased the former estate, and exhibited the same sign, with the prefix of the word "original" in smaller letters. Held, a case for injunction.⁸

A mortgagee may have an injunction against material waste, in case of insolvency.⁹

Judgment was rendered against a mortgagor, constituting a lien. The mortgagee foreclosed, making the mortgagor alone a party. The land was sold under the decree to him,

¹ *Ferris v. Ellis*, 25 Cal. 516.

² *State v. M'Glynn*, 20 Cal. 233.

³ 19 Cal. 4.

⁴ *Ensminger v. M'Intire*, 23 Cal. 593.

⁵ *Laughlin v. Kelly*, 22 Cal. 211.

⁶ *Hall v. County, &c.*,

⁷ *Creanor v. Nelson*, 23 Cal. 464.

⁸ *Woodward v. Lazar*, 21 Cal. 448.

⁹ *Robinson v. Russell*, 24 Cal. 473.

and a deed made to him. The creditor takes out execution, and advertises for sale. Held, such sale could not be enjoined by the holder of the title under the sheriff's deed, the creditor having a right to sell any interest of his debtor at the time of the judgment or execution.¹

(As to the amount of injury to water rights required for an injunction, see *Phoenix, &c. v. Fletcher*.²

As to parties and general practice, see *Trinity v. M'Cammon*.³)

In Louisiana, the clerks of the District Courts, except those of the parish of Orleans, may grant orders of injunctions in the absence of the judge from the parish, or when he is interested; and when for a specific sum, shall require bond in an amount one half over the sum enjoined. But when the sale of specific property is enjoined, the bond shall be for one half over the estimated value, as certified by the seizing officers. Injunctions may be issued by the clerk, on the oath of the party or his attorney of the absence or interest of the judge.

Injunctions may be granted on application of any purchaser, whose property is seized for the price, whenever suit has been brought for the property.

Injunctions may be granted to stay execution, when payment after judgment is alleged, when compensation is pleaded against the judgment, or when the sheriff is illegally proceeding on the execution, upon affidavit of the facts, and compliance with the legal requisitions.

No judgment or execution shall be enjoined on an allegation of compensation, set-off, or subsequent payment, except for the amount of such sum plead in compensation, &c., as shall be legally established by the defendant. And the judgment shall be executed for the surplus, as if no injunction were granted. Bond and security shall be required in double the sum alleged to be paid, conditioned for payment of damages, if the injunction were wrongful.

The clerks of the District Courts, in case of injunction,

¹ *Alexander v. Greenwood*, 24 Cal. 511.

² 23 Cal. 481.

³ 25 Cal. 119.

shall take from the party a bond, with one or more good securities, in the amount fixed by the judge, conditioned according to law.

On the trial of injunctions, the surety in the bond shall be considered a plaintiff; and upon dissolution the court shall condemn the plaintiff and surety, jointly and severally, to pay to the defendant interest at the rate of eight per cent. on the judgment, and not over twenty per cent. damages unless more be found. And the sureties shall not avail themselves of the plea of discussion. The same provisions shall apply, where a third person enjoins the execution of a judgment.¹

In Alabama, injunctions shall be granted only by the judges of the Supreme and Circuit Courts and chancellors.

An injunction to a judgment operates as a release of errors.

Proceedings after judgment shall not be enjoined, without bond, conditioned to pay the amount of the judgment with interest, and such damages and costs as may be decreed against the party.

In actions for the recovery of lands, the bond shall be for payment of the damages in the judgment if enjoined, and all damage and costs which the judgment plaintiff sustains by the injunction, if dissolved.

In other cases, the bond shall be conditioned to pay all damages which any person may sustain by the injunction, if dissolved.

After refusal of an injunction by one circuit judge, no other one can act upon the application, but application may be made to a chancellor or judge of the Supreme Court. If refused by a chancellor, it may be renewed to a judge of the Supreme Court, but no other officer; and if refused by him cannot be renewed.

No application shall be made to a judge of the Supreme Court for an injunction which may be granted by any other judge or officer, unless made to and refused by the latter. A refusal must be indorsed on the bill, and a heavy penalty is provided for erasing it.

When an injunction to stay proceedings in an action is dis-

¹ Laws of Louisiana, 1855, 324, No. 262.

solved, on final hearing, the chancellor may decree six per cent. damages on the amount of money for which such judgment was enjoined, if obtained for delay.

A bond to enjoin proceedings at law on a judgment for money, upon dissolution, in whole or in part, either upon an interlocutory or final decree, has the force and effect of a judgment, and, being certified by the register to the clerk of the court in which the judgment was rendered, execution may issue for the amount enjoined, interest, and the damages decreed. The register may also issue execution for costs, if decreed.

In case of an interlocutory decree dissolving an injunction of a judgment, a refunding bond shall be given, payable to the register, conditioned to refund the money and interest he may collect on the judgment, if on final hearing perpetually enjoined; and the court may render a final decree on such bond.

A defendant may move to dissolve an injunction in vacation, before the chancellor of the division in which the bill is filed, either for want of equity or on the coming in of the answer.

An appeal lies to the Supreme Court on all interlocutory orders, dissolving injunctions.

Notices, in case of suits and judgments, may be served upon the attorney.¹

When money is paid or collected on an execution, the whole or any part of which is enjoined in chancery, it shall be refunded on demand, if not paid over to the plaintiff, without notice of the injunction.²

In North Carolina, writs of injunction may be issued by the judges of the Courts of Equity and Supreme Court.³

No injunction commanding the stay of an execution shall be issued, except on judgments in actions of detinue, for more than the complainant shall make oath to be just.

And he shall give bond for the payment into office, upon dissolution, of the sum complained of and all costs.⁴

¹ Code of Alabama, 531.

² *Ib.* 451.

³ N. C. Rev. C. 190.

⁴ *Ib.* 191.

After four months from recovery of judgment, he shall also deposit the amount of the judgment and costs with the master; unless he make oath that the delay arose from the fraud or false promises of the other party; or that he was out of the State when judgment was recovered.

If in case of injunction the complainant deposits the sum enjoined, it may be paid upon an order of court to the plaintiff at law upon his giving bond.¹

(There are some other provisions not requiring to be stated.)

In Mississippi, an injunction to stay judgment or execution shall not be granted without notice, and the opportunity of answering.²

In Georgia, no injunction shall be sanctioned or granted by a judge of the Superior Courts, until the applicant has given to the adverse party, by application to the clerk of the Superior Court, a bond with good security for the eventual condemnation money, with future costs.

Provisions are made upon divers points of practice.

The dilatory practice of granting bills of injunction a second time, after dissolution of the first bill or bills, shall not be admissible or allowed in any case.³

By a later act, injunctions may be granted on terms discretionary with the judge.

A second injunction may be granted, where a previous one has been dismissed, for cause not connected with the merits, and when the judge is satisfied that a second injunction should issue.⁴

In Texas, provision is made as to injunction of judgments and executions; for security, and for the assessment of damages and an interlocutory decree on the bond on dissolution, where the collection of money has been enjoined; in other cases, the damages to be assessed by jury if required.⁵

¹ N. C. Rev. C. 191-2.

² Laws of Miss. 74.

³ 1 Cobb's Sts. 524.

⁴ *Ib.*

⁵ Oldh. & White, Dig. of Laws of Texas, 240.

In Florida, no writ of injunction, or *ne exeat*, shall be granted, until a bill be filed praying for such writ, except in the special cases, and for the special causes in which such writs are authorized by the practice of the courts of the United States, exercising equity jurisdiction, and no writ of injunction to stay proceedings at law shall issue, except on motion to the court or judge, and reasonable notice of such motion previously served on the opposite party or his attorney; and the defendant, after injunction granted, may either before or after answer filed, on due notice being previously given to the opposite party, or his solicitor, move the court or the judge for the dissolution of any injunction which may have been granted.¹

All injunction bonds executed in this State shall be conditioned to pay the debt and interest enjoined, and such damages as may be occasioned by the wrongful issuing of said injunction, instead of the condition now required by law, to wit, to pay the debt and interest, and ten per cent. damages thereon.²

¹ Laws of Florida, tit. 7, chap. 1.

² Florida Sta., 1852, chap. 526.

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